19

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE APPELLANT.

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Subject Index

Table of Authorities Cited

Constitutions

Statutes

Texts

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OPINION BELOW.

The opinion of the District Court (R. 200-237) is reported at 141 F. Supp. 168.

JURISDICTION.

The judgment of the three-Judge District Court was dated and entered on June 5, 1956 (R. 256-257). Notice of

Appeal was filed in that Court on July 31, 1956 (R. 257). The jurisdiction of this Court rests on 28 U.S.C. Secs. 1253 and 2101(b).

QUESTIONS PRESENTED.

I. Preliminary or Threshold Question.

Did the District Court have jurisdiction to entertain the complaint?

A. Did the complaint allege or describe an actual controversy within the meaning of 28 U.S.C. Sec. 2201?

B. Did the Plaintiff (Appellee) fail to exhaust the administrative remedy available to it in a proceeding before the Public Utilities Commission of the State of California;

C. Did the complaint involve a matter which is within the primary jurisdiction of the Pulbic Utilities Commission as an administrative agency of the State of California?

D. Was the District Court prohibited by the Johnson Act (28 U.S.C. Sec. 1342) from granting the relief requested by the Plaintiff (Appellee)?

E. Did the complaint allege facts showing irreparable injury to the Plaintiff (Appellee) in the absence of injunctive relief?

F. Did the Plaintiff (Appellee) have an adequate remedy elsewhere than in the District Court?

G. Was the District Court required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the

Government of the United States and that of the State of California?

II. Evidentiary Questions.

A. Did the District Court err in overruling Defendant's (Appellant's) objections to questions calling for expressions of opinions by Plaintiff's (Appellee's) witnesses upon the ultimate issues in the case?

B. Did the Plaintiff (Appellee) prove at the trial, by a preponderance of the evidence, that it would suffer irreparable injury in the absence of injunctive relief?

III. Ultimate Question.

Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?

STATUTES, ETC., INVOLVED.

This appeal involves the validity of California Statutes of 1955, Vol. 2, p. 3608, Chapter 1966 (California Public Utilities Code, Section 530, as amended) which is as follows (the words shown below as stricken were deleted, and those shown in italics were added, by the 1955 amendment.):

> "Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
>
> "(a) Persons ~~or property~~ for the United States, state, county, or municipal governments, or *persons*

or property for charitable or patriotic purposes, or to provide relief in cases of general epidemic, pestilence, or calamity.

"(b) Property to or from fairs or expositions for exhibit thereat.

"(c) Contractors and their employees, material or supplies for use or engaged in carrying out their contracts with such carriers, for construction, operation, or maintenance work or work incidental thereto on the line of the issuing carrier, to the extent only that such free or reduced rate transportation is provided for in the specifications upon which the contract is based and in the contract itself.

"Common carriers may also enter into contracts with telegraph and telephone corporations for an exchange of service.

"The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers as defined in the Highway Carriers' Act."

This appeal also involves the following portions of the Constitution of the United States (set out in Appendix A attached hereto): Article I, Section 8, Clause 3 (Interstate Commerce), Clause 12 (Support Armies), Clause 13 (Maintain Navy), Clause 16 (Militia), Clause 17 (Forts,

etc.), Clause 18 (Make Laws to Execute Powers); Article III, Section 2, Clause 1 (Judicial Power); Article IV, Section 3, Clause 2 (Rules re Property of United States); Article VI, Clause 2 (Supreme Law of Land); Amendment 10 (Powers Reserved to States); Amendment 14, Section 1 (Due Process).

Also involved are the following Federal statutes (pertinent portions of which are set out in Appendix B attached hereto): 28 U.S.C., Section 1342 (62 Stat. 932) (Johnson Act); 28 U.S.C., Section 2201 (68 Stat. 890) (Declaratory Relief); 49 U.S.C., Section 22 (58 Stat. 751) (Interstate Commerce Act); 10 U.S.C., Sections 2301-2314 (70A Stat. 641); 40 U.S.C., Sections 471 (68 Stat. 1126), and 481(a)(4) (64 Stat. 591) (Federal Property and Administrative Services Act of 1949, as amended).

Reference will also be made to certain provisions of the California Constitution, to additional sections of the California Public Utilities Code, and to provisions of certain minimum rate tariffs established by the Commission, (pertinent portions of which are set out in Appendix C attached hereto) as follows: California Constitution, Article XII, Section 22, California Public Utilities Code Sections 211(d), 213, 215, 216(a), 486, 493, 494, 530, 1733, 1756, 1757, 1761, 1762, 1763, 1764, 3502, 3511, 3571, 3663, 3664, 3666, 3737, 3738, 3739, 3740, 3942, 4013, 5133, 5192 and 5193; Minimum Rate Tariff No. 2, Items 20, 30, 40 and 41 Series.

STATEMENT OF THE CASE.

Preliminary Comment.

This is an appeal by the Public Utilities Commission of the State of California (hereinafter called the Commission) from a judgment of a three-Judge United States District Court for the Northern District of the State of California, Southern Division, declaring a statute of the State of California to be unconstitutional and therefore null and void, and permanently enjoining the Commission from taking any action thereunder. The statute thus nullified would have withdrawn from commercial carriers the right theretofore existing to transport property of the United States and other governmental subdivisions between points in California free or at reduced rates, and would have empowered the Commission to authorize such rates upon such terms and conditions as it should consider just and reasonable.

Before narrating chronologically the events leading up to the present action and in order to make some of those events intelligible, it appears desirable to describe briefly the constitutional, statutory and administrative framework within which commercial carriers in California are regulated.

The Commission is a body duly constituted, and has its jurisdiction prescribed, by the Constitution and statutes of the State of California, for the purpose, among others, of regulating the intrastate rates of commercial carriers for transportation of property between points in the State of California. (California Constitution Art. XII, Section 22; App. C, p. 30).

Commercial carriers of property are of various kinds, and, for purposes of regulation, can be classified in various ways. In California, for this purpose, they are classified by the physical facilities or medium employed, such as rail, motor vehicle, water or air; and motor vehicle carriers are further classified by whether they are common or contract (private) carriers, by the type of commodity transported, and by the pattern or magnitude of their operations. The Commission's authority to regulate motor vehicle carriers is contained in several distinct Acts embodying various grants of power by the Legislature, from time to time, affecting various kinds of carrier. This distinction between kinds of carrier and between the legislatives Acts under which they are regulated is important in understanding some of the events leading up to this case.

Thus, if a motor common carrier operates "between fixed termini or over a regular route," it is defined as a public utility by the Public Utilities Act, and as such is subject, like rail and water common carriers, to regulation under the Public Utilities Act. (California Public Utilities Code, Sections 211(d), 213, 215, 216(a); Appendix C, pp. 30, 31.) As such public utility, it is required to obtain from the Commission operating authority in the form of a certificate of public convenience and necessity. It is generally called a "certificated carrier." Such carrier is required by law to file tariffs (Public Utilities Code, Sections 486, 493; Appendix C, p. 31), and is prohibited (with certain exceptions) from assessing or collecting charges other than those named in its tariff (Public Utilities Code, Section 494; Appendix C, p. 31).

Other motor vehicle carriers, operating beyond the boundaries of a single incorporated city or town, but not over a regular route, nor between fixed termini, are regulated by the Commission pursuant to the Highway Carriers' Act; others, operating exclusively within the boundaries of an incorporated city or town, are regulated under the City Carriers' Act; and still others under the Household Goods Carriers' Act.[1] These classes of carrier are required to obtain merely a permit from the Commission for their operating authority (Public Utilities Code, Sections 3571, 3942, 5133; Appendix C, pp. 36-38), and are generally called "permit carriers." They are required by law to assess and collect charges no less than those established by the Commission as minimum (Public Utilities Code, Sections 3664, 4013, 5193; Appendix C, pp. 36, 38). For the purpose of regulating these types of carrier, the Commission, from time to time, has established and promulgated minimum rate orders in the form of tariffs.

Generally, although by no means invariably, the operations of the certificated carriers are on a larger scale than those of the permit carriers, and they are somewhat more firmly established financially.

Although certificated and permit carriers have different kinds of operating authority, and in other ways are regulated somewhat differently one from the other, they compete vigorously with each other for nearly all kinds of

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[1]All of these Acts are codified in the Public Utilities Code—the Highway Carriers' Act being Sections 3501-3809 thereof, the City Carriers' Act being Sections 3901-4149, and the Household Goods Carriers' Act being Sections 5101-5319.

increased" (R. 8); that in the event it should be determined that the State of California had no authority to regulate rates for the transportation of property of the United States, the United States could not be compensated by bond or otherwise for the increased expense which would have resulted to it during the period in which the statute was in force; and that enforcement of Section 530 of the Public Utilities Code might jeopardize the national security.

The complaint requested that a three-judge Court be convened pursuant to section 2284(1) of Title 28 of the United States Code; that the District Court grant a temporary restraining order and an interlocutory injunction to prevent and prohibit the Commission from enforcing or attempting to enforce said sections of the Public Utilities Code until the complaint was finally heard and determined; that upon final hearing judgment be entered declaring that insofar as Section 530 of the Public Utilities Code of the State of California and related provisions (unspecified) prohibit carriers within the State from transporting property of the United States at rates other than those approved by the Commission, they are unconstitutional and void, and that the Commission "be permanently enjoined from making any effort to prohibit the carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers . . ." [sic] (R. 9).

business; and they both compete with other forms of transportation, such as that furnished by the rails.

In order to equalize the conditions under which the certificated carriers and certain permit carriers compete with one another, there has been for many years a provision in the Highway Carriers Act prescribing in effect that the minimum rates established by the Commission for the regulation of permit carriers subject to that act shall not exceed the rates of rail or certificated motor carriers. (Public Utilities Code, Sec. 3663; App. C, p. 36.)[2]

In order further to equalize the conditions surrounding the competition for government traffic (at least the largest part of it, namely, Armed Forces traffic in so-called "general commodities"), the Commission, as a matter of policy, for a number of years prior to 1955, included in its minimum rate tariff applicable to general commodities, a special provision whereby permit carriers were allowed to "deviate from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States.". (Min. Rate Tariff No. 2, Item 20 Series, para. 3, Items 40 and 41 Series; App. C. pp. 38, 39.)[3]

In exercising the privilege thus made available to carriers to deviate from established rates in transporting property of the United States, it was the practice of car-

[2]A similar provision is contained in the Household Goods Carriers' Act, Public Utilities Code, Sec. 5192, App. p. 38.

[3]The limitation of this privilege to "Armed Forces" traffic in general commodities had significant consequences, as will appear later.

Proceedings in the District Court.

The Commission filed in the District Court a motion to dismiss the complaint on the grounds that the District Court had no jurisdiction over the subject matter of the complaint, and that the complaint failed to state a claim upon which relief could be granted (R. 15, 16). The questions raised by this motion were comprehensively briefed and argued before the District Court (R. 21-138, 198). The motion was denied (R. 198). Thereafter the Commission filed its answer (R. 199), and the case was set for trial on the merits. The trial that followed continued for a week. Twelve witnesses were called by the Government. Nine of these witnesses were military officers of the Armed Forces, having duties with respect to the procurement of transportation for Government property, and their civilian assistants (R. 369, 432, 495, 506, 530, 555, 562, 568, 597). Two other Government witnesses were representatives of railroads (R. 478, 584). One witness sought to testify upon matters related to the jurisdiction of the United States over certain military reservations in California. (R. 615-618). Over objection by counsel for the Commission, many of these witnesses were allowed to express their opinion that regulation of rates by the Commission would impede and interfere with the transportation of property of the United States (R. 382, 383, 447, 482, 483, 502, 530, 531, 560, 564). As reasons for their conclusion, they said in substance that regulation would result in increased cost to the United States (R. 384, 448, 513, 514, 531, 561, 574); that it would cause delays in shipments of property of the United States (R. 450, 505, 513); that it would impair the military security of the United States (R. 384, 450-452, 561); that it would

riers either themselves to file with government agencies so-called special rate tenders (R. 627), or to participate in such tenders prepared by tariff agents and by them filed with the Federal Government agencies (R. 626, 627).

Chronological Narration of Facts.

It will now be appropriate to narrate chronologically the pertinent events involved in this appeal.

On June 3, 1954, a group of carriers, organized into an unincorporated association called the "California Government Traffic Conference," who are engaged in the transportation of property for the Armed Forces of the United States, filed with the Commission a petition proposing the elimination of the tariff provision above referred to allowing permit carriers to deviate from minimum rates. (This petition is set out in full in the record, pages 116-118). It is stated, in substance, that the United States Government is the largest single shipper of commodities moving between points in the State of California; that carriers transporting property of the United States between such points were assessing therefor unreasonably low and depressed rates; and that such practices were creating chaotic transportation conditions in the movement of such goods, were having a depressing influence upon the revenues of carriers, and, if continued, would result in creating a burden on other traffic. The petition further recited that "the public interest and the preservation of a sound minimum rate structure requires that such practice be stopped and that the privilege [to deviate from minimum rates for Armed Forces traffic] be discontinued." The petition requested that the matter be set for public

be difficult to distinguish between interstate and intrastate traffic (R. 383, 441, 514); that the present system of procuring transportation for Government property is a good system (R. 422, 575), although attended by certain abuses that result in depressed rates (R. 422, 479); and that the very existence of state power would be onerous (R. 409, 413).

When the United States had rested the Commission renewed its motion to dismiss. The motion was again denied (R. 619).

One of the witnesses called by the Commission was its Director of Transportation (R. 683). He testified in substance that he recognized in Section 530 of the Public Utilities Code a legislative policy to give the United States Government preferential treatment (R. 687); that he would so advise the Commission (R. 687); that he saw no reason why special commodity rates could not be established for the United States upon a proper showing (R. 688); that it could be done expeditiously and without a public hearing (R. 689, 693); that he saw no reason why regulation of rates by the Commission would cause delays in the movement of military traffic (R. 689); that the Commission could authorize rates for Government traffic to be made effective retroactively, that is, after moves had taken place (R. 689); and that with respect to traffic involving military security, he would recommend a general order exempting such traffic from regulation (R. 689, 690).

The Commission's Chief Counsel stipulated on the record that he would officially advise the Commission that it has lawful authority under California law to authorize any carrier to negotiate with the United States with con-

hearing and that the Commission take appropriate steps to grant relief.[4]

On June 17, 1954, an amendment to this Petition for Modification No. 34 was filed by the California Government Traffic Conference. In this amendment the original request to eliminate the special tariff provision was modified into a request that this provision be changed so as to allow permit carriers to deviate from the minimum rates "to the extent necessary to meet the rate of common carriers [i.e., rail or certificated motor carriers], on file for use with the Armed Forces of the United States, pursuant to Section 530 of the Public Utilities Code."

A prehearing conference and public hearings were held upon the amended petition, at all of which counsel appeared for the interested agencies of the United States (R. 120, 121, 82, 83).

On January 25, 1955, the Commission issued its decision (No. 51047) upon this amended petition. (This decision is set out in full in the record at pages 81-90.) In it the Commission found that "certain permit carriers have driven rates for the handling of [U. S. Government] shipments to a depressed and unreasonably low level, thereby creating chaotic transportation conditions in the movement

[4]This petition was filed in Case No. 5432 as "Petition for Modification No. 34." Case No. 5432 is one of those continuing proceedings contemplated by Section 3738 of the Public Utilities Code (Appendix C, p. 37). It was originally commenced by the Commission on its own motion and is the proceeding in which the Commission established the basic minimum rate tariff for general commodities, this tariff being designated as Minimum Rate Tariff No. 2. From time to time various interested parties file petitions requesting modification of this basic rate order, and such a petition is usually entitled and docketed by the Commission as "Petition for Modification No. ....."

plete freedom concerning the transportation of any property of the United States which may involve security matters if a responsible federal official certified that such transportation involved security (R. 700); and that the Commission has authority to authorize special rates under Section 530 of the Public Utilities Code without a public hearing and to make such rate authority effective immediately (R. 701).

The matter was orally argued on April 19, 1956, at which time the Commission again renewed its motion to dismiss, and also argued the ultimate question (R. 704, 724-737). Eleven days later, on April 30, 1956, the District Court handed down a 40-page memorandum decision in favor of the Government, wherein the District Court stated its reasons for its ultimate decision as well as for its denial of the Commission's motion to dismiss the complaint (R. 200-237). The Government's counsel was directed to prepare proposed findings of fact, conclusions of law, and a form of judgment (R. 237).

Summary of Findings by District Court.

Fifteen pages of findings (R. 240-253) were so proposed and adopted by the District Court. In substance, they were that there is a large volume of military traffic in California; that this traffic is different from commercial traffic; that some of it moves from and to installations situated on land ceded by the State of California to the United States; that rate regulation by the Commission would increase the cost of transportation to the Government, would require additional personnel, and would cause delays in the shipment of Government property; that due

to the flow of military materiel through the Government's depot system "it would be difficult to determine whether particular items shipped from one installation in California to another installation in California were in fact intrastate or interstate in character" (R. 250); that it would be necessary to segregate materiel within the various depots and in trucks and rail cars in accordance with its origin or destination, resulting in "delays, increased man hours of work on the part of military personnel, friction and possible litigation" (R. 250); that regulation of rates by the Commission would jeopardize the security of the United States; that the United States might have to relocate its depot system; that its officers would choose interstate rather than intrastate routes for its traffic to the prejudice of carriers in California; that the foregoing objections to regulation would be multiplied in case of war; that officers of the United States would be subject to criminal prosecution for violations of the Public Utilities Code or regulations of the Commission; and that "the transportation industry in California is in a healthy economic condition." (R. 252)

Conclusions of Law of the District Court

The conclusions of law (R. 253-256) proposed by counsel for the Government and adopted by the District Court were in substance that it had jurisdiction over the cause and the parties thereto; that the complaint stated a claim upon which relief could be granted; that the complaint described an actual controversy within the meaning of 28 U.S.C., Section 2201; that "for no valid reason within the police powers or other reserve powers of the State of

of such goods. Such depressed and unreasonably lo rates for government traffic are depressing the revenue of the carriers now and previously engaged in the han dling of such traffic and if continued will create a burde upon other traffic."

The Commission also found in this opinion that permi carriers "should be permitted to deviate from the mini mum rates specified in Minimum Rate Tariff No. 2 onl to the extent necessary to meet a lower common carrie quotation to the Armed Forces of the United States pro viding such Armed Forces give notice to this Commissio that they require common carriers to file such quotation with this Commission prior to their becoming effective Otherwise there should be no limitation on the right o such permit carriers to deviate from said minimum rate in connection with transportation of property for the Armed Forces of the United States."

It was also stated that "there is nothing in this record to indicate whether the Armed Forces of the United States will require common carriers to file such quotations with this Commission and in the absence of such showing we will not at this time revise the third paragraph of Item 20 Series. However, upon the filing of a supplemental peti tion for modification herein by the California Government Traffic Conference stating that the Armed Forces of the United States propose to require common carriers to file with this Commission quotations for the intrastate car riage within California of property for the Armed Forces of the United States and attaching to said supplemental petition a written statement from the Armed Forces of the United States expressing such intention, this Commis-

sion will issue a supplementary order hereto revising the third paragraph of Item 20 Series to read [in such a way as to authorize permit carriers to] deviate from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States only to the extent necessary to meet a lower rate of a common carrier for the transportation of said property providing the Armed Forces of the United States notify this Commission in writing that common carriers are required by them to file such common carrier rates with this Commission in a form acceptable to the Commission. . . . In the event the Armed Forces of the United States do not notify this Commission in writing that common carriers are so required to file such rates with this Commission or revoke any such notice previously given, [permit carriers] may deviate without limitation from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States."

On March 11, 1955, the petitioner, California Government Traffic Conference, filed with the Commission a Petition for Reconsideration, Modification or Rehearing with respect to said Decision No. 51047 (R. 128-135). This petition recites, among other things, that "representatives of your petitioner have discussed with the Armed Forces the decision of your Commission and have requested of the Armed Forces that the Armed Forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their becoming effective. *Your petitioner has been unsuccessful in its endeavors to cause the Armed Forces to give*

California, the application of Section 530 of the Public Utilities Code of California, as amended, will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense," (R. 254); and that regulation of rates for the shipment of military materiel would be unconstitutional and void in the absence of any act of Congress; that by Section 22 of the Interstate Commerce Act, 24 Stat. 387 (49 U.S.C. 22), the Armed Services Procurement Act, 41 U.S.C. 151(c) [62 Stat. 21-26], and the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, Sections 201 and 202 [40 U.S.C. 471, 481, 483], Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be free of regulation; that *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, is inapplicable to this case for the reasons that under the regulation involved in the *Penn Dairies* case there would be no direct interference with the officers of the United States in the discharge of their responsibilities, no delays or increased administrative burden or revelation of secret matter in the procurement of the items of supply there involved, and that the regulation of the price of milk by a State is related to the health of the population of the State; that the stipulation of counsel for the Commission that regulation by the Commission will not require the furnishing of secret information and that such regulation will involve a minimum burden on the United States, though made in utmost good faith, was irrelevant; that insofar as Section 530 of the Public Utilities Code of the State of California

purports to authorize the Commission to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers for the transportation of property of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, Section 8, Clauses 11, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; and that if said Section 530 should be applied to the United States, it would suffer irreparable injury, and that the United States had no adequate remedy at law.

Judgment of the District Court.

On June 5, 1956, the District Court entered judgment in the form proposed by counsel for the Government (R. 256, 257), by which it ordered, adjudged and decreed as follows:

> "1. Insofar as section 530 of the Public Utilities Code of the State of California purports to authorize the Public Utilities Commission of California to impose 'such conditions as it may consider just and reasonable' upon the granting of reduced rates by commercial carriers in favor of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, section 8, clauses 11, 12, 13, 16 and 17, and Article IV, section 3, clause 2, of the Constitution of the United States.
>
> "2. Defendant Public Utilities Commission of the State of California and its agents and employees are hereby permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements

such notice to your Commission, and your petitioner has been informed that the Armed Forces do not feel it is appropriate for them to give such a notice to your Commission and that they will not give such a notice to your Commission.'' (Emphasis added throughout unless otherwise indicated.)

On May 3, 1955, the Commission granted a rehearing with respect to said Decision No. 51047 "to be held . . . at such time and place as may hereafter be designated." (R. 123-124).

Thereafter, in July 1955, the California Legislature amended Section 530 of the Public Utilities Code. An examination of this statute as amended, supra, (pp. 3, 4), shows that its effect was to withdraw from carriers subject to the Public Utilities Act (i.e., rail carriers, certificated motor carriers, and other carriers named in said Act), the privilege of transporting property for the United States and local governments free or at reduced rates, and empowered the Commission to permit reduced rates to such extent and subject to such conditions as it considers just and reasonable. This amendment was to become effective September 7, 1955.

It should be noted, however, that the amended statute contains a provision for continuing the privilege to the carriers subject to regulation under the Public Utilities Act to the extent necessary to enable them to meet any rates of other such carriers or rates allowed to the permit carriers. This proviso in the statute was obviously intended to prevent rival carriers from obtaining any competitive advantage over the carriers subject to the

with respect to rates for the transportation of property of the United States."

Notice of appeal from this judgment was filed in the District Court on July 31, 1956 (R. 257).

SUMMARY OF ARGUMENT.

I. Preliminarily, the District Court should not have entertained the action, but should have granted the Commission's motion to dismiss.

(A) The complaint did not describe an "actual controversy" within the meaning of the Declaratory Judgment Act, nor can it be determined who are the adversary parties. The Commission was named as the sole defendant, but there is not a single word in the complaint alleging that the defendant Commission had done, or was about to do, or had threatened to do, anything whatever adverse to the United States, or to any of its officers or agents; nor any allegation of any circumstance giving rise to a duty in the Commission to do any such adverse act, and to the probability thereof. The only adverse act alleged in the entire complaint is an act of the California Legislature, viz., that "in July, 1955, the Legislature amended Section 530 of the Public Utilities Code and deleted" certain parts thereof. The United States then alleged that "the application of Section 530 of the Public Utilities Code as amended to shipments made by it would" have certain prejudicial consequences. But there is no allegation that the Commission had applied, or was about to apply, or had threatened to apply said Section 530 to shipments made

Public Utilities Act. This proviso therefore had the effect of nullifying the withdrawal of the privilege, that is to say, it restored the privilege in part, so long as, and to the extent that, permit carriers were authorized to deviate from the minimum rates when transporting general commodities for the Armed Forces.

On August 10, 1955 a notice was sent to all interested parties giving notice of a rehearing on August 25, 1955, with respect to said Decision No. 51047 (i.e., the decision above referred to issued January 25, 1955 on Petition for Modification No. 34) (R. 114).

On August 16, 1955, the Commission, in order to give effect to the Legislature's intent to lodge discretion in the Commission, cancelled the provision of the minimum rate order above described (Item 20 in Minimum Rate Tariff No. 2) that allowed permit carriers unlimited authority to deviate from the minimum rates for the transportation of general commodities for the Armed Forces. This decision by its terms was to become effective on September 7, 1955, contemporaneously with the amendment to Section 530 of the Public Utilities Code (Decision No. 51832 in Case No. 5432; R. 90-92).

This decision, in conjunction with said amendment, was calculated to have the effect of withdrawing from all commercial carriers the previously enjoyed right to deviate from established rates in transporting property of the United States.

On August 25, 1955, a public hearing was held pursuant to the above described Notice of Hearing with respect to said Decision No. 51047 upon Petition for Modification

by the United States, or that it would administer the statute in an unlawful or burdensome way; nor is there any allegation of any circumstance giving rise to a duty in the Commission so to apply said section as amended, and a probability that the Commission would apply it.

These defects in the complaint were not merely formal, but were symptomatic of fundamental objections to declaratory and injunctive relief for purposes of this case, objections that are disclosed when this case is viewed in the light of *Public Service Commission of Utah v. Wycoff Co.* (1952), 344 U.S. 237, 97 L. ed. 291, and *Alabama State Federation of Labor v. McAdory* (1944), 325 U.S. 450; 89 L. ed. 1725. Such relief involved a futile and premature intervention in a field of public law; the conflict of interest between the United States and the State of California was not ripe for determination, but was nebulous and contingent; instead of quieting controversy the ruling sought (and granted) was calculated to confuse, and to stir up litigation; it did extreme violence to the Federal-State relationship; and there has been no authoritative construction of the statute by the state courts.

(B) The complainant failed to exhaust an administrative remedy available to it. It was a party to a proceeding before the Commission involving the power of the Commission to regulate the intrastate rates of commercial carriers for the transportation of property of the United States between points in California. Under the law of California, the United States had available to it an adequate and speedy means of obtaining judicial review, first by the Supreme Court of California and finally by this Court, of the Commission's decision exercising

No. 34, at which the appearance of "Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the U. S. Government" was entered. The matter was "Taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of Decision No. 51832 . . ." (Decision No. 51922; R. 94).

On August 26, 1955, the Department of Defense of the United States Government, pursuant to such reservation, filed with the Commission a petition to postpone the effective date of said Decision No. 51832 (R. 104-109). Among other things, this petition states (paras. 9 and 10):

> "9. That certain present rate tenders which have been effective for both permitted and common carriers contain rules and other provisions which are non-acceptable to the military establishment, which establishment is presently conducting negotiations with California tariff agencies to modify these rate tenders in such a manner to make them mutually acceptable. There is very little difference in the views of some of these agencies with those of this department, and *it is believed that such differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated*, however, the Government is opposed to Decision No. 51832 becoming effective.
>
> 10. That if said order becomes effective as scheduled, after September 7, military traffic of necessity will have to be transported by common carriers regardless of the adequacy or inadequacy of their services and the reasonableness or unreasonableness of

that power. Such a review would have permitted the Supreme Court of California to interpret authoritatively the meaning and scope of Section 530 of the Public Utilities Code as amended, and to pass upon its constitutionality; and would have afforded this Court an opportunity to review the California Court's judgment if the United States were aggrieved thereby. And the effectiveness of the Commission's action under the statute could have been stayed pending such review. The United States, however, acquiesced at first in the Commission's exercise of that power, seeking merely, and obtaining, a postponement of its effect, and representing to the Commission that new rates acceptable to the United States, the carriers, and the Commission, could be negotiated in a relatively short time. The United States thus waived its right under California law to obtain judicial review. The United States then changed its mind, and at the eleventh hour sought to nullify the Commission's action in the Federal Court.

Moreover, the United States had available to it, by appropriate proceedings before the Commission, an administrative remedy by means of which it could avoid all the evils alleged in the complaint, including unreasonable costs of transportation, delays of Government shipments, and violations of national security.

(C) The complaint alleged that certain rates established for other shippers are "unrealistically high" when applied to shipments of the United States. This allegation in effect sought a finding pertaining to the reasonableness of such rates for Government shipments. Such a finding, however, calls for the exercise of an informed

their traffic rates until acceptable permitted carrier tenders are formulated *and approved*, if they deviate from the Public Utilities Commission rates."

The petition concludes with the following prayer:

"WHEREFORE, the Department of Defense respectfully urges that your Commission postpone the effective date of Decision No. 51832 for a period of 90 days or until: (a) acceptable rate publication of permitted carriers setting forth the actual rates to be charged the government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the government traffic pattern, which are *acceptable to your Commission.*"

On September 6, 1955, the Commission issued a new decision by which it ordered that "The third paragraph of Item 20E of Minimum Rate Tariff No. 2 . . . is *hereby* cancelled effective December 5, 1955 . . ." (Decision No. 51922 in Case No. 5432; R. 93-99). The opinion states (R. 97):

"After careful consideration of the record, the Commission is of the opinion and finds that the effective date of the elimination from Minimum Rate Tariff No. 2 of the rule in Item 20 permitting transportation for the Armed Forces at free or reduced rates should be extended to December 5, 1955 in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended."

By a petition filed November 21, 1955, the United States Department of Defense sought a further 60-day postponement (R. 110-114).

On November 29, 1955, the Commission denied this request for further extension (Decision No. 52287, in Case No. 5432; R. 100-101). In this decision the Commission stated:

> ". . . The Commission has once postponed the cancellation of this provision for a period of 90 days upon representations that during such period satisfactory rate arrangements would be negotiated and proposed to the Commission for its consideration.
>
> "The intent of the Legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. *This action will in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable.*"

As a result, the cancellation of the tariff provision was to become effective at 12:01 A.M. on December 5, 1955, which was a Monday. The effect would have been to deprive all commercial carriers of the privilege of transporting Armed Forces general commodities free or at reduced rates. On the afternoon of the preceding Friday, December 2, 1955, the complaint in this proceeding was filed, and a temporary restraining order, an interlocutory injunction, and a permanent injunction were requested, together with certain declaratory relief pursuant to Title 28, Section 2201 of the United States Code. The complaint appears in the Record at pages 1-9.

The prayer for injunctive relief was that the District Court "grant a temporary restraining order and an interlocutory injunction and all appropriate process necessary to prevent and prohibit the Public Utilities Commission of the State of California from enforcing or attempting to enforce said provisions of the Public Utilities Code, as amended, until this cause is finally heard and determined on the merits;" and that "the Public Utilities Commission of the State of California be permanently enjoined from making any effort to prohibit the carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers . . ." (sic).

In the afternoon of Friday, December 2, 1955, when the complaint was filed, counsel for the plaintiff (Appellee, hereinafter called the "United States" or "Government") applied to the District Court for a temporary restraining order. In the course of his argument he said:

> "The Public Utilities Commission has by order implemented this Section 530 of its Public Utility Code, and that order is to take effect at 12:01 a.m. on Monday, December 5th, so that if action is not taken as of today the section will be in effect as of a minute after midnight on Sunday." (R. 265).

The Commission was given an opportunity to be heard upon the question of whether the proposed restraining order should issue; and its counsel pointed out that "The Commission has already issued certain orders which,

merely by the lapse of time and complete inaction by the Commission, will become effective as of 12:01 Monday morning; . . . To put it another way, the carrier industry and the government . . . have had ninety days within which to prepare for the effectiveness of this order which the Commission has already entered. So that, as I say, if the Commission does nothing, that order will become effective; . . . Moreover, the Commission presumably, if it sought to comply with this Court's order, would have to convene and sign out a new order countermanding its present order, and give notice to thousands of carriers in the industry countermanding its present order." (R. 268, 269).

The following colloquy also took place:

"Mr. PHELPS: Yes. Well, my position is, Your Honor, what can the Commission do or what will Your Honor expect the Commission to do in compliance with the restraining order: Who is going to be restrained from doing what? That's what is not clear to me.

"THE COURT: The Public Utilities Commission, by the language of the temporary restraining order, I believe is restrained from carrying this order into effect.

* * * * * * * *

"That is all that this order does, would be to say to the Public Utilities Commission, 'Stay it. Stay it for an additional period of time,' and that will maintain the status quo, and I don't see any particular inequity in that. * * *

"MR. PHELPS: And do I understand, Your Honor, that you construe the order, which I have not yet seen, to mean that the Commission is to take

immediate or all reasonably practicable steps to abate, so to speak, the effectiveness of that order?

"THE COURT: I do. I do, yes. I don't want to be equivocal about that at all.

"I am going to do everything in my power to see that it is carried out." (R. 272, 273, 281).

Thereafter, in the *afternoon* of December 5, 1955, the Commission issued a decision to become "effective on the date hereof," in which it was ordered that "the cancellation of the third paragraph of Item 20E of Minimum Rate Tariff No. 2 is hereby suspended until final disposition of the case of United States of America, Plaintiff vs. Public Utilities Commission of the State of California, Defendant, Civil Action No. 35101, now pending in the United States District Court for the Northern District of California, Southern Division, and until the further order of the Commission." (Decision No. 52317 in Case No. 5432; R. 102-104).

Summary of Complaint.

The 9-page complaint (R. 1-9) alleged in substance that the United States has established numerous civil and military installations in the State of California; that some of these installations are situated on land ceded by the State of California to the United States and are under the exclusive jurisdiction of the United States; that property of the United States moving in intrastate commerce is commingled in the depot system maintained by the United States with property moving in interstate and foreign commerce; that it has been the practice of the United States to negotiate special rates with common

carriers for the transportation of its property; that for many years the State of California exempted transportation of property of the United States from the provisions of California law pertaining to the filing of tariffs or approval of rates; that in July, 1955, the Legislature of the State of California amended Section 530 of the Public Utilities Code and deleted therefrom said exemption; that the application of the amended statute would disrupt the established practice of the United States, cause delays in shipments of its property, might jeopardize the security of the United States, and increase the administrative expense of the United States by requiring its officers and officials "to disentangle certain commodities from the mass of commodities in the current of commerce to determine whether or not particular shipments were in fact intrastate" (R. 4); that such shipments would be "thrown into the class rate, which as applied to such shipments, is recognized as unrealistically high" (R. 4, 5); that the commodities involved in such shipments are not in competition with those of commercial shippers; that United States transportation officers might find it more economical to ship interstate and that California carriers might be precluded from participating in such traffic; and that the United States might have to relocate its depot system and might thereby cause loss of employment to citizens of California.

For these reasons the complaint alleged that Section 530 of the Public Utilities Code "and related sections" (unspecified) were unconstitutional and void under Article VI, Section 2 of the Constitution of the United States insofar as said sections prohibit carriers within the State

of California from transporting property of the United States at rates different from those approved by the Commission in that said sections place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; place an unreasonable burden on interstate commerce; contravene the policy of the Congress implicit in the Federal Property and Administrative Services Act of 1949; and that the penalties provided in said Public Utilities Code are vague and uncertain and repugnant to Amendment XIV of the Constitution of the United States.

The complaint further alleged that the enforcement of said Section 530 of the Public Utilities Code would cause immediate and irreparable injury to the United States in that the long established practice of the United States in negotiating special rates would "be completely disrupted and there will be attendant confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission" (R. 8); the necessity of having rates approved by the Commission "would entail added clerical and administrative work, which would not only be a burdensome interference to the United States in the discharge of its constitutional responsibility, but would likewise add an additonal expense (R. 8); that "with the disruption of the existing rate structure by the application of the section, undoubtedly many particular shipments would be thrown into the class rate structure. Accordingly, the cost of transporting the property for the United States would be immeasurably

made on August 26, 1955, the Commission postponed this cancellation and made it effective December 5, 1955 (Decision No. 51922, Case No. 5432, R. 93-99).

It is very significant that at this time (August 26, 1955) the United States made no move to arrest the effect of the amendment of Section 530 to the extent, as above described, that it was to become self-executing. Nor was any such move made until the filing of the complaint on December 2, 1955, *months after the statute had become self-executing in important areas of traffic,* as above described.

And, with respect to Armed Forces general commodities traffic, viewing the matter prospectively, as of any time before December 5, 1955, it should be noted that *the mere lapse of time and complete inaction by the Commission* would result in the disappearance, on December 5, 1955, of the exemption of that traffic from established rates, due to the Commission's cancellation order.

The record does not show what was done, as first September 7 and then December 5, 1955, approached, by the carriers who had filed or participated in special rate tenders to United States Government agencies. But each one must have done one of two things, (a) cancelled or withdrawn from, or allowed to lapse, his special rate tenders believing in the validity of the compulsion (September 7) of the statute, or the validity of the Commission's cancellation (December 5) of the Item 20 provision; or (b) done nothing to cancel or withdraw. Those who did nothing may have been motivated either by the belief that the statute would automatically, on September 7, 1955, nullify all such tenders for all government traffic except Armed Forces general commodities traffic, and that the Commission's can-

cellation of the Item 20 provision would, on December 5, 1955, have the effect of nullifying special rates for Armed Forces general commodities traffic; or, the failure to act may have been attributable to an intention to oppose and test the constitutionality of the amendment, or of the Commission's cancellation decision.

It must have been clear to the United States when the complaint was filed, at least it ought to have been clear to its responsible officers if they had sought the advice of their counsel who had participated for months in the proceeding before the Commission, that an injunction in December, directed against the Commission and strictly prohibitory in form; in effect commanding inaction by the Commission, would be of no avail whatever to the United States for relieving any of its traffic from previously established rates. Yet, that is the futility which the United States was pursuing when it filed its complaint on December 2, 1955.

It should have been clear also when the complaint was filed that a declaration by the District Court of the unconstitutionality and invalidity of the statute rendered days, or weeks, or months after September 7 and December 5, 1955, would precipitate numerous questions of law and controversies as to what were the lawful rates for the transportation of property of the United States after September 7, 1955. Some of these questions should be described. Would the District Court's declaration of unconstitutionality entered long after September 7, 1955 (in fact dated June 5, 1956, R. 256) relate back to September 7, 1955, the date the statute became effective? If so, what effect would it have on the transportation charges of those

carriers who had cancelled, or withdrawn, or allowed to lapse, their participation in special rates, believing in, and perhaps conditioning their action upon, the validity of the compulsion of the statute? Would the District Court's subsequent declaration breathe life back into those special rate tenders? What about those carriers who did not cancel or withdraw their participation in special rate tenders in the belief (a reasonable one) that these tenders would automatically be nullified by the statute on September 7, or by the Commission's decision on December 5? Would they be bound anyway by their special rate tenders?

The question of rates for Armed Forces general commodities traffic was further complicated by the fact that the California Highway Carriers Act, in referring to minimum rate orders and decisions of the Commission, requires that "upon the issuance by the Commission of any decision or order made applicable to a particular class or group of carriers, or to particular commodities transported or areas served, the Commission shall serve a copy of the decision or order without charge upon each carrier affected . . . Each carrier shall observe any tariff, *decision*, or *order* applicable to it *after service thereof.*" (Public Utilities Code, Sec. 3737.)

The record shows that counsel for the Commission advised the District Court that the Commission would have to give notice to thousands of carriers in the industry (R. 269). The record does not show when the Commission was able to complete the service upon permit carriers of its decision of December 5, 1955, postponing indefinitely the cancellation of the Item 20 deviation provision. But in view of the magnitude of the task it is reasonable to infer

that service upon many carriers was not completed until days after December 5, 1955. What were the rates in the meantime of those who had outstanding special rate tenders? Were those tenders cancelled by the Commission's decision that became effective, for a time, on December 5? And were they revived when the Commission indefinitely postponed this cancellation? Or was the District Court's restraining order *ex proprio vigore*, a rate-fixing order having the effect of nullifying the Commission's cancellation of the deviation privilege in Item 20? These time intervals are important in view of the immense volume of United States Government traffic that moves in California, a volume of such magnitude as to justify the assumption that it moves in a virtually continuous flow.[6]

It is not easy to answer the questions posed above. And in considering them it is very important to bear in mind that *no carrier nor any group of carriers was a party* to the proceeding in the District Court.[7] The question therefore immediately arises as to what extent, if at all, any carrier is bound by the judgment below.

In the light of what has been said about the peculiarities of the rate structure in California, and the deplorable effect produced upon it by the District Court's action, it is clear that the complaint was ill conceived, and that there were serious objections to the granting of declaratory and injunctive relief in this case. The complainant's grievance was so nebulous and contingent that there was uncertainty

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[6]This traffic amounted to 2,121,341 tons intrastate in California in 1954 (R. 2).

[7]A petition by a group of carriers for leave to intervene was denied by the District Court, and their counsel was permitted to argue only as amicus curiae (R. 202).

administrative judgment, and belongs within the primary jurisdiction of the Commission as an administrative agency of the State of California.

(D) The District Court was prohibited by the Johnson Act (28 U.S.C. 1342; App. B, pp. 7, 8) from granting any relief from the Commission's decision of September 6, 1955 (No. 51922). This decision (1) contained an order affecting rates chargeable by public utilities; (2) it was made by a state administrative agency; (3) jurisdiction of the District Court was based upon repugnance of the order to the Federal Constitution; (4) the order by its terms was not applicable to and did not interfere with interstate commerce; (5) the order was made after reasonable notice and hearing; (6) a plain, speedy and efficient remedy could be had in the courts of California. There is good reason in this case why the prohibition of the Johnson Act should be applicable to the United States.

(E) The equities were against the United States. It would not have suffered irreparable *or any injury whatever* in the absence of injunctive relief, and had adequate remedies elsewhere than in the District Court. In addition to the right of the United States, already described, to obtain a final determination of the constitutionality of Section 530 of the Public Utilities Code, as amended, and an interim stay of Commission action thereunder, there was still another way in which the interests of the United States in the intrastate rates of carriers could be fully protected without the exercise of the drastic injunctive remedy. The complaint describes the practice of the United States to move its supplies and materiel by common carrier. In California, as elsewhere, common car-

riers have a legal duty to accept property and transport it without delay. The United States, through its authorized officers, could at any time demand prompt transportation service from these common carriers. If the District Court had not issued its restraining order, the minimum rates established by the Commission would have become controlling on December 5, 1955 upon permit carriers, and the rail and certificated motor carriers would on that date have become bound, under California law, by their own tariffs, by virtue of Section 530 of the Public Utilities Code as amended. But the United States would have been free to set up in actions at law, in the United States Court of Claims, or in the United States District Courts, by way of defense against carriers' claims for payment of minimum or tariff charges, the same argument that it advanced before the District Court below, namely, that the United States is not bound to pay minimum or tariff rates established by a State. Or, in the event that the State of California initiated any proceeding seeking to impose any sanction upon any carrier who charged the United States less than established rates, then the United States could intervene in such a proceeding and there set up the same argument, which would then be available to the carrier as a defense.

This want of equity in the United States is to be contrasted with the *irreparable and continuing* injury to commercial carriers in California resulting from the District Court's injunction and the Commission's compliance therewith. These carriers have now forever lost the right to collect minimum or tariff charges for the transportation of property of the Armed Forces since December 5, 1955,

a right which they would have had but for the restraining order of the District Court and the action taken by the Commission in compliance therewith. The denial of this right, and the consequent accumulation of pecuniary damage, presently continues, and will continue so long as the District Court's injunction remains in effect.

(F) The District Court should have abstained from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California. The District Court was advised at the time the Government applied for a temporary restraining order, on a Friday afternoon, that only affirmative action by the Commission before 12:01 A.M. on the following Monday, countermanding a prior order, could accomplish what the Government sought; that it would be impossible to obtain such action in the limited time available, and give notice of such action to the thousands of carriers who might be affected; that confusion and uncertainty would obtain as to what would be the applicable rates as of 12:01 A.M. the following Monday; that the uncertainty could continue for a substantial period of time; that Government traffic moves in large volume in California, and would probably be moving during this period; that the United States had been a party to a proceeding before the Commission involving the exercise by the Commission of the power conferred by Section 530 of the Public Utilities Code as amended, and that the United States could still fully protect itself by defending against suits by carriers for minimum or tariff rates. The District Court acknowledged that its order might cause confusion; that the Government

might have been dilatory in bringing the matter before the Court; and that the issuance of a restraining order would cause a "mechanical problem" to the Commission and cause financial loss to carriers.

The written restraining order proposed by the United States, being merely prohibitory in form, was inconsistent with the restraining order orally proposed requiring affirmative action by the Commission, and was calculated to put the burden on the Commission of trying to resolve this ambiguity, and of choosing between being in contempt of the District Court for failure to take affirmative action, and doing nothing as required by the written restraining order, whereas the burden was on the United States to propose an unambiguous restraining order making plain what was required of the Commission.

Despite these inequities, the District Court issued the proposed restraining order and orally construed it to require affirmative action by the Commission. Thereupon the Commission convened and decided to take affirmative action. It issued a new order countermanding its prior order. But the Commission did none of these things until after 12:01 A.M., Monday, December 5, 1955. A cloud of uncertainty was thus cast upon the rate structure for Government traffic in California, a cloud that has not been and will not be dispelled for many months. There was little comity and no wise accommodation exemplified by this rough handling of California's sovereignty.

II. A. The District Court erred in overruling the Commission's objections to questions calling for expressions of opinion by the Government witnesses upon the ultimate issues in the case. Analysis of the record shows

that this was not merely a harmless error of discretion, but that it resulted in the District Court's being unduly swayed by the *in terrorem* testimony of high ranking military officers zealous in the performance of their duties as members of the Armed Forces, the rights of the several states to the contrary notwithstanding.

B. The United States did not prove at the trial that it would suffer irreparable injury in the absence of injunctive relief. Not only did the United States have adequate legal remedies to protect its interests, but analysis of the record shows that its only possible injury from California's regulation of intrastate rates for the transportation of property of the United States is that of increased costs for such transportation. This was not enough to require the striking down of the state statute, according to *Penn Dairies v. Milk Control Commission,* 318 U.S. 261, 87 L. ed. 748.

III. The District Court's final judgment was erroneous. Whether this judgment rested upon the broad ground that any attempt whatever by any State to regulate the intrastate rates of carriers of property of the United States is unconstitutional, or whether the judgment rested upon the narrow ground merely that Section 530 of the Public Utilities Code, as amended, of the State of California, in particular is unconstitutional, in either event the judgment was wrong. There is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit State regulation of such rates. Nor is any immunity of the national government from any burden resulting from such regulation to be implied from the Constitution. Nor does State regulation of such rates conflict with any Congres-

sional legislation, or with any discernible Congressional policy or intent. The Armed Services Procurement Act of 1947, the Federal Property and Administrative Services Act of 1949, and the regulations promulgated thereunder, are wholly consistent with State regulation of intrastate rates for the transportation of property of the United States. The California Legislature's amendment of Section 530 of the Public Utilities Code was a lawful exercise of a power reserved to the States by the Tenth Amendment of the Constitution of the United States. The judgment of the District Court declaring this statute unconstitutional and void, and restraining any Commission action under it, was a violation of said Tenth Amendment.

ARGUMENT.

I.

THE DISTRICT COURT SHOULD NOT HAVE ENTERTAINED THE COMPLAINT BUT SHOULD HAVE GRANTED THE COMMISSION'S MOTION TO DISMISS THE ACTION.

A. The complaint did not allege or describe an "actual controversy" within the meaning of the Declaratory Judgment Act (28 U.S.C., Sec. 2201), and within the grant of judicial power in Article III, Section 2, clause 1, of the Constitution of the United States.

The complaint covers 9 pages of the printed record (pp. 1-9).

The Commission is named as the sole defendant but there is not a single word in the complaint alleging that the Commission had done, or was about to do, or had threatened to do anything whatever adverse to the United States or to its officers or agents. Nor is there any allega-

tion of any circumstance giving rise to a duty in the Commission to do any such act, and to the probability thereof. The only act described in the entire complaint that is possibly adverse to the United States is that "in July, 1955, the Legislature amended Section 530 of the Public Utilities Code and deleted" certain parts thereof. The United States then alleged that "the application of Section 530 of the Public Utilities Code, as amended, to shipments made by it *would*" have certain prejudicial consequences. But there is no allegation that the Commission had applied, or was about to apply, or had threatened to apply said Section 530 to shipments made by the United States, or that it would administer said statute in an unlawful or burdensome way; nor is there any allegation of any circumstance giving rise to a duty in the Commission so to apply said section as amended, and to a probability that the Commission would so apply it; nor is there any such allegation with respect to any California law enforcement officer or agency. Nor did the Government at the trial offer any evidence of any of these things.

The Commission is entitled to ask who is the adversary against whom the United States is proceeding. Is it the State of California; or the Commission? The Commission is not the State of California but an agency thereof created by its people in its Constitution (Article XII, Section 22; App. C, p. 30). If the State of California was intended as the adversary, why did not the complaint say so, and why was not the State of California proceeded against, as in *United States v. California* (1946) 332 U.S. 19; 91 L. ed. 1889? If the Commission was intended as the adversary, why was there no allegation of any act or

threatened act by the Commission adverse to the United States? See *Watson v. Buck* (1941) 313 U.S. 387; 85 L. ed. 1416; *Ex Parte La Prade* (1933) 289 U.S. 444; 77 L. ed. 1311; *United Public Workers v. Mitchell* (1947) 330 U.S. 75; 91 L. ed. 754.

These questions do not raise mere legal niceties, but disclose some deepseated fallacies in the theory of declaratory relief for the purposes of this case, fallacies that are very glaring when seen in the light of the principles governing declaratory relief discussed in *Public Service Commission of Utah v. Wycoff* (1952), 344 U.S. 237, 243, 244, 247; 97 L. ed. 291, 296-298; *Alabama State Federation of Labor v. McAdory* (1944), 325 U.S. 450; 89 L. ed. 1725; and more recently applied in the case of *Public Utilities Commission of California v. United Air Lines* (1953), 346 U.S. 402; 98 L. ed. 140. In a discussion of declaratory relief in the *Wycoff* case, it was said: "While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." It was pointed out that in that

case "The proposed decree cannot end the controversy." It was also said that the declaratory proceeding was not appropriate in that case "because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship;" and that "declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system."

In order to demonstrate why declaratory relief was inappropriate for purposes of the present case, and to show the deplorable consequences that followed the granting of such relief, it is necessary to describe the peculiarities of the rate structure in California as it existed prior to September 7, 1955 (the effective date of the amendment to Section 530), and how it was affected by the amendment and by the subsequent action of the District Court.

It is well settled that tariffs, when established, have the force and effect of statutes. *Cramer v. Lowden* (1942), 315 U.S. 631, 635, 636; 86 L. ed. 1077, 1080; reh. den. 316 U.S. 708; 86 L. ed. 1775.

Prior to the California Legislature's amendment of Section 530 of the Public Utilities Code in 1955, rail and certificated motor carriers, in assessing charges for the transportation of property of the United States, irrespective of the kind of property, and irrespective of the agency making the shipment, were free to depart from their previously established tariffs that were applicable to commercial shippers. And permit carriers, in assessing charges for the transportation of *general commodities for the Armed Forces* of the United States, were free to charge

less than the minimum rates established by the Commission and applicable to other shippers. It was the intention of the 1955 amendment to withdraw this unlimited and unconditional privilege from the rail and certificated motor carriers, but with a proviso that would continue their right to meet the competition of the permit carriers. So long as the third paragraph of Item 20 in Minimum Rate Tariff No. 2 remained in effect, uncancelled by the Commission, the permit carriers would have an unlimited right to charge less than minimum rates for the transportation of *general commodities for the Armed Forces* even after the amendment to Section 530 became effective. And, by virtue of the proviso referred to, this right would also be available to rail and certificated motor carriers.

It can thus be seen that paragraph 3 of Item 20 of Minimum Rate Tariff No. 2 was the keystone in the arch of exemption of *Armed Forces general commodities traffic* from established rates.

With respect, however, to certain special commodities, such as petroleum (Minimum Rate Tariff No. 6), and fresh fruits and vegetables (Minimum Rate Tariff No. 8), and livestock (Minimum Rate Tariff No. 3), there had never been in the applicable minimum rate tariffs established by the Commission for those commodities any authority to permit carriers to charge less than the minimum rates named therein, neither to the Armed Forces nor to any of the civilian agencies of the United States government, such as the General Services Administration, the Veterans Administration, the Bureau of Reclamation, and others. With respect to these special commodities and the civilian Government agencies, the rail and certificated

motor carriers were relieved of the duty of charging the rates named in their own tariffs only by virtue of the exemption for all government traffic contained in Section 530 of the Public Utilities Code before its amendment.

In its effect upon rail and certificated motor carriers therefore, the amendment to Section 530, removing this unconditional exemption and making it depend upon Commission authority, was *self-executing in important areas of government traffic;* that is to say, no further action whatever, by anyone, was necessary to subject to rates *previously established* for commercial shippers the traffic of all United States government agencies in certain special commodities, and traffic of the civilian agencies in all commodities.

On September 7, 1955, therefore, traffic of the United States Government became subject, like traffic of commercial shippers (except to the extent that the proviso in the amendment to Section 530 became operative) to the legal duty imposed upon rail and certificated motor carriers by Section 494 of the Public Utilities Code (Appendix C, p. 31) to charge their tariff rates. On that date, all special rate quotations of rail and certificated motor carriers formerly available to the United States were (with the exception noted) automatically superseded, through the operation *ex proprio vigore* of the amendment, by the previously established tariff rates of rail and certificated motor carriers.

Nor has the applicability of these rates of rail and certificated motor carriers to the United States Government been changed by anything that has happened since September 7, 1955, unless it should be decided (and it

would be a very dubious result[3]) that the temporary restraining order of the District Court on December 2, 1955, or its final judgment on June 5, 1956, was *ex proprio vigore* a rate-fixing order, having the effect of reinstating all the special rate quotations previously available to the United States. Even then, it will be seen that there was a substantial interval of time intervening between September 7 and the dates of the restraining order and the final judgment.

Although the amendment to Section 530 was self-executing, as described, upon substantial portions of United States government traffic, there was another large and important area of such traffic that was not automatically affected by this amendment on September 7, 1955, because it was reached by the proviso in the amendment, namely, Armed Forces general commodities traffic.

In anticipation of the results that would occur on September 7, 1955, and in realization of the fact that the Legislature's intention to correct the evils and abuses surrounding the transportation of Government property would be frustrated in a large and important area of such traffic so long as the deviation privilege in Item 20 for Armed Forces general commodities remained outstanding, the Commission on August 16, 1955, cancelled Item 20, effective September 7, 1955, contemporaneously with the effectiveness of the amendment of Section 530 of the Public Utilities Code (Decision No. 51832, Case No. 5432, R. 90-92). Then, at the request of counsel for the United States,

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[3]See *United States v. Kansas City Southern Railway Co.* (1955; C.A. 8) 217 Fed. 2d 763, 768 holding that courts cannot make rates.

as to who was its adversary, and as to what kind of injunctive relief was needed to protect the complainant's asserted interests. The result was that one party was named as the sole defendant (the Commission), while only the act of another (the California Legislature) was alleged; a restraining order was proposed in writing that was entirely prohibitory in form, while it was orally proposed that the Commission be commanded to take affirmative action; because of the self-executing character of the amendment to Section 530, neither kind of injunctive relief could accomplish what the Government and the District Court sought to accomplish, namely, maintenance of the *status quo* (R. 273, 277); and any attempt by the Commission to comply with the District Court's ambiguous restraining order was calculated to cause confusion and uncertainty, and to result in litigation as to what were the lawful rates of carriers on and after December 5, 1955.

These circumstances furnish an excellent example of the deplorable consequences that can follow upon hasty, ill-considered, and reckless interference by a federal court in a State's local affairs, where there may exist complexities not immediately perceived or understood.

It should not be concluded from the forgoing that the Commission denies the right of the United States ever to litigate the question of the right of a State to regulate the intrastate rates of carriers of property of the United State. But this question can arise in a variety of ways, each providing a context different from the others and giving a different complexion to the constitutional question. There is an almost limitless variety in the kinds of property transported for the United States by commercial car-

riers (R. 371, 881). Much of it, but by no means all, is Armed Forces traffic (R. 881). The Armed Forces ship many items peculiar to military organizations, such as ammunition and tanks (R. 371), but they also ship a very large volume of commodities of the same kind as those of commercial shippers; subsistence items, for example.[8] Some of the articles shipped by the Armed Forces involve military or national security (R. 599, 601); others do not. With respect to some articles, speed in movement is of the essence (R. 499, 500), while with others time is not important. Many articles presently move under the class rates applicable to commercial shippers (R. 377, 572), special rates not having been sought by the Government nor offered by carriers. Traffic in such articles would be little, if any, affected by state regulation. Some shipments may move from one enclave under exclusive federal jurisdiction to another such enclave; for others, origin or destination, but not both, may be in such an enclave.

The constitutional question could be precipitated in various ways, viz., (a) an action by a carrier in the United States Court of Claims or District Court to recover charges based upon established rates (see *Hughes Transportation, Inc. v. United States* (1954), 121 Fed. Supp. 212[9]); (b) a proceeding by the state against a carrier to invoke sanctions for assessing less than established rates

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[8]In California there is more traffic in subsistence items than anything else (R. 388, 522).

[9]One wonders why the Government elected not to permit this case to be the vehicle for a test of the constitutionality of a state law regulating rates for the transportation of property of the United States. It arose out of transportation performed for the Government prior to May, 1952. The Court of Claims rendered

for the transportation of property of the United States, in which the United States could intervene; (c) a proceeding before the Commission wherein a carrier, or the United States, felt itself aggrieved by a decision of the Commission exercising its statutory authority.

All of these proceedings could terminate in this Court, where the constitutional question could be decided (*Alabama Public Service Comm. v. Southern R. Co.* (1951), 341 U.S. 341; 95 L. ed. 1002), and all of these proceedings would involve *specific transportation*, that is, specific points of origin and destination, specific commodities, and specific agencies of the Federal Government. It could be ascertained in any such proceeding whether time was of the essence; whether the transportation was for the military or civilian agencies of the United States; whether military or national security or federal enclaves were involved; whether the established rates were reasonable or unreasonable when applied to specific transportation of property of the United States; and whether state regulation of that specific transportation was unduly burdensome upon the United States.

Multiplicity of actions is no objection. On the contrary, it is most desirable that the principles to be applied to a constitutional question of this magnitude be evolved in a number of proceedings presenting various aspects of that question.

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its decision upholding state regulation on May 4, 1954. On December 6, 1954, the United States filed a motion requesting reconsideration (R. 69). On July 12, 1955, the Court of Claims reopened the case and referred it to a commissioner to take evidence (R. 70). This case has apparently been shelved ever since.

Conflicts of interest arising in such proceedings would, in the language of the *Wycoff* case, be "ripe for determination as controversies over legal rights." The disagreements would "not be nebulous or contingent but [would] have taken on fixed and final shape so that a court [could] see what legal issues it is deciding, what effect its decision [would] have on the adversaries, and some useful purpose [would] be achieved in deciding them." Final decisions in such proceedings would end the controversies. Moreover, the ultimate determination by this Court of the issues raised in such proceedings would not be "incompatible with a proper federal-state relationship" and would not involve an "anticipatory judgment by a federal court to frustrate action by a state agency."

The judgment of the District Court in the present case violated nearly all the rules of the *Wycoff* case. It was a radical and sweeping intervention in a field of public law that had the effect of foreclosing in the future any State regulation whatever in an area where the Federal versus State problem could arise in a number of different contexts, each one of which would give a somewhat different complexion to that problem. This intervention was premature in the sense that it was undertaken before any specific transaction or any specific Federal agency or carrier was affected by State regulation, and at a time when the conflict of interest between State and Federal Government was nebulous and contingent. From another point of view the intervention came too late and was futile for the purpose of resolving a number of questions that will arise out of the fact that the statute become partially effective, and the Commission's cancellation of the deviation privilege

became temporarily effective, or at least apparently so. So far from ending controversy, the District Court's order had the effect of stirring up litigation. The declaratory ruling sought by the complaint (and granted by the District Court) reached far beyond any particular case and beyond what was warranted by the circumstances, since it *affected all Government traffic under all conditions.* (R. 256, 257). The action taken by the District Court did extreme violence to a proper Federal-State relationship, without any regard for the implications of our Federal System.

Moreover, the judgment below ignored the principles applicable to declaratory relief laid down in the above cited case of *Alabama State Federation of Labor v. McAdory* (1945), 325 U.S. 450, 461, 471; 89 L. ed. 1725, 1734, 1740. In this case it was said:

> "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. . . . This Court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied, . . .
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> "The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court. . . . It would be an abuse of discretion for this Court

to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the state by forestalling state action in construing and applying its own statutes. . . ."

B. The United States failed to exhaust the administrative remedy available to it in a proceeding before the Commission.

The United States had available to it an administrative remedy which it should have pursued instead of seeking relief from this Court. Its interests could have been fully safeguarded and preserved by taking advantage of the machinery afforded by California law to stay the order in the Commission's decision of September 6, 1955, which cancelled, effective December 5, 1955, the deviation privilege contained in Item 20 of Minimum Rate Tariff No. 2, pending a test of its constitutionality. This decision (Decision No. 51922; R. 93-99) was rendered in a proceeding in which the United States appeared as a party. Under California law the United States thereupon had a right to file with the Commission an application for rehearing (P.U. Code Sec. 3739; App. C, p. 37) which, had it been filed ten days or more before the effective date of the

Commission's decision, would have suspended the order until the application for rehearing was granted or denied (P.U. Code, Sec. 1733; App. C, p. 31). If the Commission had denied the application for rehearing, the plaintiff could have applied to the Supreme Court of California "for a writ of certiorari or review for the purpose of having the reasonableness" of the Commission's decision "inquired into and determined" (P.U. Code, Secs. 3740, 1756; App. C, pp. 37, 32). In such a proceeding before the California Supreme Court, California law provides that the review shall include a determination of whether the Commission's order or decision violates any right of the petitioner under the Constitution of the United States (P.U. Code, Sec. 1757; App. C, p. 32); and that where the validity of the Commission's order or decision "is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the determination of the constitutional question shall not be final." (P.U. Code, Sec. 1760.)

California law also provides the means of obtaining from the California Supreme Court a stay of a Commission order during the pendency of such a writ, including a temporary stay without notice or hearing, where irreparable injury would result in the absence of such relief (P.U. Code, Secs. 1761-1764; App. C, pp. 32-35).

Under California law proceedings in the Supreme Court of California involving any order or decision of the Commission ". . . shall be preferred over, and shall be heard and determined in preference to, all other civil business

except election causes, irrespective of position on the calendar. . . ." (P.U. Code. Sec. 1767).

If the United States were aggrieved by any decision of the California Supreme Court, it then would have a direct right of appeal to this Court (28 United States Code, Sec. 1257(2); App. B, p. 7), pending which a motion to stay the judgment of the California Supreme Court could be addressed to this Court (Rule 18 of Revised Rules of the Supreme Court of the United States; App. B, p. 18).

In this way amended Section 530 of the Public Utilities Code and the Commission's action in connection therewith could have been tested as to their constitutionality by this Court without ever having become effective, and the United States would have suffered no injury whatever, irreparable or otherwise.

The California Supreme Court would thus have had an opportunity to authoritatively interpret the amended statute, and to define the scope of the Commission's power thereunder. It is important, for reasons that will more fully appear hereinafter, to afford the California Court such an opportunity since the constitutionality of the statute may well turn upon the interpretation given to it by the highest court of the state. *Alabama State Federation of Labor v. McAdory* (1945), 325 U.S. 450; 89 L. ed. 1725. It is very important to know, for example, whether the Commission, in exercising its power under the amended statute, could authorize rates for the transportation of property of the United States to become effective retroactively; whether it could authorize a blanket exemption from established rates for certain kinds of Government traffic; whether there is discernible in the amended statute

a legislative policy to extend preferential rate treatment to the United States and other governmental bodies; whether a public hearing is necessary upon applications to the Commission for authority to deviate from established rates for the transportation of property for the United States; and whether any sanctions provided by California law for any violation of Section 530 would impinge upon the United States, or its officers or agents. It is important to know the answers to these questions before any conclusion is reached as to whether the statute would be unduly burdensome to the United States, or whether its interests will be little if any affected by the state regulation. *Leiter Minerals, Inc. v. United States* (1957), 352 U.S. .....; 1 L. ed. (2d) 267. In the case cited it was said (L. ed. p. 275): ". . . as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. . . ." And disposition of the federal court action in that case was ordered delayed to permit the parties to seek an interpretation of the state statute in the state court.

The Government elected however not to pursue the above described method of seeking judicial review of the Commission's power, presumably because the Commission's Decision No. 51922 granted the relief requested by the Government in its petition of August 26, 1955, namely, a postponement of the effective date of the Commission's order of August 16, 1955, cancelling the tariff provision. This petition (R. 104-109) is highly significant for a number of reasons. First, it acknowledges (para. 10) the Commis-

sion's jurisdiction over the rates in question and, in effect, acquiesces in that jurisdiction; second, it discloses the Government's confidence that it could accommodate itself to the new conditions and make necessary adjustments "within a relatively short time" (para. 9); third, it implies a voluntary election not to challenge the constitutionality of the 1955 amendment of Section 530 of the Public Utilities Code, and of the Commission's action in connection therewith, and to take the benefit thereof.

It is plain, therefore, that the United States has failed to exhaust an administrative remedy available to it, and this Court has declared that under such circumstances there is no right to relief in the Courts. *Alabama Public Service Comm. v. Southern R. Co.* (1951), 341 U.S. 341; 95 L. ed. 1002; *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41; 82 L. ed. 638; *Coffman v. Breeze Corps.* (1945) 323 U.S. 316; 89 L. ed. 264; *Aircraft & D. Equipment Corp. v. Hirsch* (1947), 331 U.S. 752; 91 L. ed. 1796; *Allen v. Grand Central Aircraft Co.* (1954) 347 U.S. 535, 540, 553; 98 L. ed. 933, 946.

In the last two cited cases it was held that the presence of constitutional issues does not avoid the necessity of exhausting administrative remedies.

There is another course of action which was, and still is, available to the Government whereby it could have obtained, and still can obtain, from the Commission, relief from the tariff rates established by California law for commercial shippers. It could negotiate reduced rates with the carriers who would be free to apply to the Commission for authority to assess them pursuant to the provisions of

Section 530, as amended, and Public Utilities Code Section 2666 (App. C, p. 36). This is the course which the Government first elected to pursue when it requested of the Commission a 90-day postponement of the effective date of the Commission's action to permit the negotiation of "mutually acceptable tenders" (R. 107). In denying the Government's request for a second postponement of sixty days, the Commission said that its action would "in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable." (R. 101).

Apparently a lack of diligence on the part of the Government in negotiating new rate agreements with the carriers prevented the consummation of such agreements within the 90 days allowed by the postponement of the effectiveness of the Commission's action, but the opportunity to effect such agreements and obtain Commission approval is still open.

C. The complaint raised an issue which is within the primary jurisdiction of the Commission as an administrative agency of the State of California.

The complaint alleged (R. 4, 5) that "the application of Section 530 of the Public Utilities Code, as amended, to shipments made by [the United States]," among other things, would cause such shipments to be "thrown into the class rate, which, as applied to such shipments, is recognized as unrealistically high, because the density, volume and other characteristics of such shipments would normally entitle them to rates equivalent to the commodity rates negotiated by commercial concerns."

Some evidence, which will be more fully described hereinafter, purporting to prove this allegation, was adduced by the Government at the trial.

A determination of whether or not "class rates" when applied to shipments of the United States are "unrealistically high" because of the alleged peculiar characteristics of such shipments, requires the exercise of an informed administrative judgment.

There is a number of cases in which this Court has described and applied the "primary jurisdiction doctrine." This doctrine is closely related to, but is distinct from, the doctrine that an available administrative remedy must be exhausted before relief can be obtained in the Courts, and requires that administrative questions be determined by administrative agencies rather than by the Courts.

The doctrine was established in the *Abilene Cotton Oil* case (*Texas and Pac. R. Co. v. Abilene Cotton Oil Co.* [1907], 204 U. S. 426; 51 L. ed. 553) and has been applied in a number of subsequent cases of which *Far East Conference v. U.S.* (1951), 342 U.S. 570; 96 L. ed. 576, and *U. S. v. Western Pac. R. Co.* (1956), 352 U. S. .....; 1 L. ed. 2d 126, are examples. It was said in the case of *Public Service Commission of Utah v. Wycoff* (1952), 344 U.S. 237, 246; 97 L. ed. 291, 297 that "Even when there is no incipient Federal-State conflict, the declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review."

A careful reading of the District Court's opinion, findings of fact, conclusions of law, and judgment, leaves one in doubt as to whether the District Court decided the question of whether "class rates" are "unrealistically high" when applied to Government shipments. There is reason to believe that it did decide this question. Thus, in finding No. XIII (R. 247) in referring to large volume shipments of the United States, the District Court found that if Section 530, as amended, became effective, "such shipments would have to be made at the class rate. In many instances the class rates would be 50% to 100% higher than the commercial[10] rate for shipments of similar character." And in finding No. XV (R. 248), the District Court found that many military items that move under so-called "freight all kinds" rates "would be thrown into a very high classification. In many situations, the freight rate for such shipments would be increased by 150%."

Presumably, these findings entered into the District Court's conclusion of law No. V (R. 254) that Section 530, as amended, "will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense."

In any event, whether the District Court did or did not determine the issue of whether "the class rate" is "unrealistically high," its action had the effect of depriving the Commission of any opportunity to exercise its informed administrative judgment upon this question.

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[10]It is believed that the Court intended to use the word "commodity" instead of the word "commercial".

D. The District Court was prohibited by the Johnson Act, 28 U.S.C. 1342, from granting the injunctive relief requested by the complaint.

The Johnson Act, 28 U.S.C. 1342, is as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> "(2) The order does not interfere with interstate commerce; and,
>
> "(3) The order has been made after reasonable notice and hearing; and,
>
> "(4) A plain, speedy and efficient remedy may be had in the courts of such State."

All of these conditions were fulfilled in the present case with respect to the Commission's orders upon the subject of rates for the transportation of property for the United States Government.

(1) In substance the complaint alleged that certain action of the State of California was repugnant to the Constitution of the United States (paras. I, VI; R. 1, 6), and no reference was made therein to any order of the Commission. As stated above, however, in the Chronological Narration of Facts (supra, pp. 15, 17, 18) such orders were in fact issued and the District Court interpreted its temporary restraining order as requiring the Commission to abate its order issued September 6, 1955 (Decision No.

51922; R. 93-99) which cancelled (effective December 5, 1955) the tariff provision giving permit carriers unlimited authority to deviate, for transportation of Armed Forces general commodities traffic, from the minimum rates established by the Commission.

It has already been explained (supra, pp. 14, 15) how, by virtue of the proviso in the 1955 amendment to Section 530 of the Public Utilities Code, the rates of rail and certificated motor carriers for the transportation of Armed Forces general commodities traffic were allowed to drop to the rates of permit carriers. The Commission's order in said Decision No. 51922, therefore, had the effect of withdrawing from both permit and rail and certificated motor carriers their former privilege of charging less than established rates for the transportation of such traffic.

It has been explained, also, (supra, p. 7) that rail and certificated motor carriers are public utilities for all the purposes of California law (Public Utilities Code Secs. 211 (d); 213; 216(a); App. C, pp. 30, 31); and there is, therefore, no doubt that the Commission's order in said Decision No. 51922 was an "order affecting rates chargeable by a public utility and made by a state administrative agency" within the meaning of the Johnson Act.

The Commission submits also that permit carriers, although regulated in California under the Highway Carriers' Act and distinguished from rail and certificated motor carriers for certain purposes of regulation, nevertheless should be considered as public utilities within the meaning of the phrase "public utility" as used in the Johnson Act. As appears at the outset of the Highway

Carriers' Act, permit carriers are engaged in "a business affected with a public interest," and are regulated in California for the purpose of serving public needs and objectives (P.U. Code, Sec. 3502; App. C, p. 35).

The order contained in Commission Decision No. 51922, as it affected permit carriers, was therefore an "order affecting rates chargeable by a public utility and made by a state administrative agency." *Morel v. Railroad Commission* (1938), 11 C. (2d) 488; *Entremont v. Whitsell* (1939), 13 C. (2d) 290.

(2) The order contained in Commission Decision No. 51922 did not interfere with interstate commerce. As already explained, this order had the effect of requiring both permit and rail and certificated motor carriers to assess, for the transportation of Armed Forces general commodities traffic, the same rates as they assess against commercial shippers, unless otherwise authorized by the Commission. Such rates, for permit carriers, were those established in Minimum Rate Tariff No. 2. By its own terms this tariff is applicable only to "transportation of shipments between *all points within the State of California*" with certain exceptions not material here (Minimum Rate Tariff No. 2, Item 30; App. C, p. 39).

This provision in Minimum Rate Tariff No. 2 reflects the provision contained in the Highway Carriers' Act that "This chapter [containing the regulations for permit carriers] shall not be construed as a regulation of commerce with foreign nations or among the several States, except insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States." (P.U. Code, Sec. 3506).

That part of California law governing rail and certificated motor carriers and the Commission's regulation thereof, namely, the Public Utilities Act, provides that "Neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States, . . ." (P.U. Code, Sec. 202).

It thus appears that the State of California has expressly recognized the constitutional limitations upon its power, and has made it plain that the Commission's delegated powers do not operate upon interstate commerce unless authorized by the Constitution and laws of the United States. There can be no doubt therefore that the Commission's Decision No. 51922 affected rates only for transportation of Armed Forces general commodities traffic *between points within the State of California.* Wherever it could be shown that such property was moving in interstate commerce, such fact, *ipso facto,* would give rise to an exemption from any rates established by California law, unless the contrary result is permitted under the Constitution and laws of the United States.

(3) The description heretofore given (supra, pp. 10-17) of the history of the proceedings before the Commission leading up to Decision No. 51922 shows clearly that the order issued in said decision was "made after reasonable notice and hearing." A Notice of Hearing was sent to all interested parties on August 10, 1955, giving fifteen days notice of a rehearing on August 25, 1955, upon the petition of the California Government Traffic Conference (R. 114), and it is stated in the subsequent decision thereon that

"public hearings were held . . . at San Francisco on August 25, 1955." (Decision No. 51922; (R. 94).)

(4) A description was given above under topic I B (supra, pp. 55-57) of the remedy available to the United States before the Commission, and thereafter in the Supreme Court of the State of California, whence a direct appeal lies to this Court. It is clear from this description that this remedy is "plain, speedy and efficient."

For the foregoing reasons, the Commission submits that the Johnson Act prohibited the District Court from granting the injunctive relief requested by the complaint.

The Commission further submits that the Johnson Act's clearcut policy and prohibition are not to be circumvented merely by requesting a declaratory judgment as additional relief. *Great Lakes Dredge & Dock Co. v. Huffman* (1943), 319 U. S. 293, 299; 87 L. ed. 1407, 1412.

"The Johnson Act was designed to prevent federal assumption of jurisdiction to adjudicate and not merely the issuance of an injunction." Borchard, Declaratory Judgments, p. 828 (2d ed. 1941).

The Commission is aware of the holding in *Leiter Minerals Inc. v. United States* (1957) 352 U.S. .....; 1 L. ed. 2d 267, that the prohibition against federal court action contained in 28 U.S.C. Sec. 2283[11] is not applicable when the United States seeks a stay of proceedings in a State court. The Commission is also cognizant of the holding in

[11]28 U.S.C. Sec. 2283 is as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

U. S. v. United Mine Workers (1947), 330 U.S. 258; 91 L. ed. 884, that the provisions of the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. Sec. 101), prohibiting federal court jurisdiction, subject to qualifications, to issue an injunction in labor disputes to enjoin certain acts, did not apply to the United States.

The Commission, however, respectfully urges that there are considerations present in the instant case, and potentially in others like it, that require a different conclusion from those announced in the cases just cited. The Johnson Act is concerned with maintaining the integrity of State regulation of public utility rates. The various agencies of the United States Government, military and civil, have become in recent years consumers of public utility services on a very large scale, and *on a continuing basis*. Through their representatives, they frequently appear as parties in proceedings before State agencies that exercise regulatory authority over public utility rates. It is to be expected that their attorneys will be zealous, as they should be, in asserting and protecting to the utmost the interests of the United States as a utility rate payer. It would be unfortunate, however, if these agencies were encouraged to believe that they could resort to a federal court whenever they were disappointed in the action of a State regulatory agency in fixing public utility rates. The rate fixing authority of the States would be just as effectively paralyzed by such action as it formerly was by the public utilities before the enactment of the Johnson Act.[12] See *Kansas-Ne-*

[12]This analysis immediately suggests a deeper problem which will be discussed below in a subsequent topic (infra pp. 151, 162), namely, if it should be held that the United States is not bound

braska Natural Gas Company, Inc. v. City of St. Edward (1955; U.S.D.C. Neb.) 134 F. Supp. 809, 828; (C.A. 8) 234 F. 2d 436.

The large scale and continuing use of public utility services by United States Government Agencies will insure to the United States a lively and continuing interest in rate proceedings before State regulatory bodies, and in the rates fixed therein. If it should be established as a precedent that the Johnson Act does not bar the way of the United States to the Federal Court, it is easy to imagine a succession of cases in that forum seeking nullification of State rate orders.

The *Leiter Minerals Case*, on the other hand, involved an unusual if not unique set of circumstances wherein the interest of the United States was as a proprietor of certain land which it had purchased for $25,000 and which was the subject of a series of transactions involving mineral rights therein. The precedent of that case is not likely to prove embarrassing to the States. The same can be said of the *United Mine Workers Case* which arose out of the extraordinary emergency caused by the 1946 strike in the bituminous coal industry while the Government was in possession of the mines pursuant to an Executive Order of the President. There was no Federal-State conflict, and the need for brushing aside the impediment of the Norris-La Guardia Act under such circumstances is not likely to arise very often.

The District Court, in its opinion, did not meet the objection to its jurisdiction presented by the Johnson Act.

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by State regulation of transportation rates, why should it be bound by State regulation of rates of other kinds of public utility services?

(R. 233). Instead, without a clear-cut and specific recognition even of the existence of the Commission's order, the District Court says its jurisdiction was based "principally upon the unconstitutionality of a *statute*, not of an *order* . . . made by a State administrative agency or a rate-making body." (Emphasis by District Court). Apparently the District Court forgot the urgent appeal made by counsel for the Government when he applied for a temporary restraining order (R. 265), and failed to understand that it was essential to the Government's purposes to nullify the Commission's order.

E. The equities were against the United States; it would not have suffered irreparable or any injury in the absence of injunctive relief by the District Court, but had adequate remedies elsewhere; on the contrary, persons other than the United States have suffered, and will continue to suffer irreparable injury as a result of the District Court's granting the request for injunctive relief.

At this point, the Commission's purpose is merely to show why the District Court should not have entertained the action and why it should have granted the Commission's motion to dismiss. For this purpose, it seems proper to consider merely the allegations of the complaint and the affidavits in support thereof and to demonstrate their inadequacy as a foundation for the issuance of a temporary restraining order. In a subsequent topic, it will be shown that nothing was added by the Government at the trial to justify permanent injunctive relief.

After referring, in paragraph VI (R. 6) to "Section 530 and related sections [unspecified] of the Public Utilities Code of the State of California," the complaint alleged in paragraph VII (R. 7, 8) that "the said section

and related provisions [unspecified] and regulations [unspecified]" would "cause immediate and irreparable injury to the United States," for the following reasons, in substance:

(1) Disruption of long-established rate structure would cause "confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission."

(2) Added clerical and administrative work and additional expense.

(3) Shipments would be thrown into "class rate structure," resulting in increased transportation cost, for which the United States could not be compensated by bond or otherwise.

(4) The United States "*might* be compelled to reveal information in connection with particular shipments which for purposes of national security should be kept secret."[13]

Without stopping to argue at length that these allegations are not well pleaded (an objection that was made by the Commission in its Memorandum of Points and Authorities in support of its Motion to Dismiss, R. 71), the Commission submits that the only thing approximating a clear, forthright allegation of damage is the allegation that the enforcement of California law would result in increased cost and expense to the United States. Assuming the truth of this allegation for purposes of considering the preliminary question as it was presented to the District Court, and assuming, for the same purpose, that the

[13]Nothing of substance was added by the affidavits (R. 189-198).

United States would prevail on the ultimate question of whether California may regulate rates for transporting property of the United States Government, these assumptions, nevertheless, did not demand injunctive relief. It has already been described above in topic I B (supra, pp. 55-57) how the United States could have tested in this Court the constitutionality of Section 530 of the Public Utilities Code, as amended, and obtained an interim stay of Commission action thereunder, without such Commission action ever becoming operative upon the United States, with the result that the United States would have suffered no injury whatever, irreparable or otherwise.

But there was still another way in which the interests of the United States in the intrastate rates of carriers could be fully protected without the exercise of the drastic injunctive remedy and its lamentable consequences. The complaint describes the practice of the United States to move its supplies and material by common carrier. (R. 2, 3). In California, as elsewhere, common carriers have a legal duty to accept property and transport it without delay (California Civil Code, Sections 2114, 2169; Appendix C, p. 39; *Standard Oil Co. v. Johnson* [1944] 24 C. 2d 40, 46). The United States, through its authorized officers, could at any time demand prompt transportation service from these common carriers. Nor would this duty of such carriers have been affected by the existence of any controversy with the United States as to what were the lawful rates. *New York Central R. Co. v. Public Utilities Commission of Ohio*, 119 Oh. St. 381; 164 N.E. 427; *Corbett v. Atlantic Coast Line R. Co.*, 205 N.C. 85; 170 S.E. 129.

If the District Court had not issued its restraining order, the minimum rates established by the Commission would have become controlling on December 5, 1955, and thereafter, upon permit carriers, for all kinds of United States Government traffic and for all United States Government Agencies, and the rail and certificated motor carriers would on that date have become bound, under California law, by their own tariffs,[14] by virtue of Section 494 (Appendix C, p. 31) and the amendment to Section 530 of the Public Utilities Code.

But the United States would have been free to set up in actions at law, in the United States Court of Claims, or in the United States District Courts, pursuant to 28 U.S.C., Sections 1346, 1491 (Appendix B, pp. 8, 9), by way of defense against the carriers' claims for payment of minimum or tariff charges, the same argument that it advanced before the District Court, namely, that the United States is not bound to pay minimum or tariff rates established by a State. Or, in the event that the State of California initiated any proceeding seeking to impose any sanction upon any carrier who charged the United States less than established rates, then the United States could intervene in such a proceeding and there set up the same argument, in which event such defense would be available to the carrier.

This want of equity in the United States is to be contrasted with the *irreparable and continuing* injury to com-

[14]Except possibly in a case where a rate in a tariff of a rail or certificated motor carrier was higher than the tariff rate of another such carrier, or higher than the minimum rate established by the Commission, in which case the lower rate could be charged under the proviso in the amendment to Section 530.

mercial carriers in California resulting from the action of the District Court.

It should now be assumed, in continuing the purpose of considering the preliminary question as it was presented to the District Court, that the Commission will prevail upon the ultimate question of whether California can regulate rates for the transportation of property of the United States Government.

The California Government Traffic Conference in its above described Petition for Modification No. 34 (R. 118), represented to the Commission, and the Commission in its Decision No. 51047 (R. 85) found, that: "Certain permit carriers have driven rates for the handling of [Government] shipments to a *depressed and unreasonably low level,* thereby creating chaotic transportation conditions in the movement of such goods. Such *depressed and unreasonably low rates* for government traffic are *depressing the revenues of the carriers* now and previously engaged in the handling of such traffic and if continued will create a burden upon other traffic."

The action taken by the California Legislature and by the Commission was calculated to remedy this condition by requiring carriers to charge the Government at the higher level of rates established in the tariffs of rail and certificated motor carriers and in Minimum Rate Tariff No. 2 unless otherwise authorized by the Commission. If the District Court had not issued its restraining order requiring the Commission to countermand its initial action, then, as of December 5, 1955, and thereafter, the carriers would have had not only the legal right but the legal duty

to assess and collect rates at such higher levels. *That right was forever and irrevocably lost when the Commission, in compliance with the District Court's restraining order, indefinitely suspended the cancellation of the deviation provision in Minimum Rate Tariff No. 2, and thereby continued, for an indefinite period of time, the opportunity for some carriers to hold rates at a "depressed and unreasonably low level."* When other carriers, in order to compete, assess these low level rates, and when, but for the District Court's order, they would have had a right and a duty to collect higher rates, it is clear that they have suffered and continue to suffer, irreparable injury. In view of the allegations in the complaint that ". . . in the year 1954 military traffic in California to and from and between the various installations located within the State amounted to 21,121,341 tons. The cost of moving the material was approximately 20 million dollars" (R. 2) it will be understood that the injury to the carriers is not only irreparable but is also of very great magnitude. The injury suffered since December 5, 1955 is irreparable; but the injury presently continues, and will continue to accumulate every day that the District Court's order remains in effect.

A balancing of these equities alone should have dissuaded the District Court from granting the relief requested by the complaint.

F. The District Court was required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship of the Government of the United States and that of the State of California.

In the Chronological Narration of Facts hereinabove set out (supra, pp. 10-21) the history of the events leading up

to the filing of the complaint was described. It will be convenient to recapitulate here the salient features of that history.

The record shows that on June 3, 1954, a group of carriers engaged in the transportation of property of the Armed Forces of the United States in California filed a petition with the Commission seeking relief from the cut-throat competition that had driven rates for such transportation to unreasonably low levels which had the effect of unreasonably depressing the revenues of the petitioners, with the likelihood of creating a burden on other traffic (R. 85); that the Commission attempted to cope with the problem but was forced to the conclusion that it could not be resolved without cooperation from the Armed Forces of the United States to insure the publicity of special rate quotations offered to the Armed Forces by rail and certificated motor carriers (R. 88); that the Armed Forces declined to cooperate (R. 131, 132); that the California Legislature then intervened and amended Section 530 of the Public Utilities Code; that the Commission then acted to implement that legislation (R. 90, 92), but at the request of the United States, postponed for 90 days the effectiveness of its action upon representations by counsel for the Government that the Department of Defense could accommodate itself to the new law "within a relatively short time" (R. 107); that, thereafter, the Commission declined the request of the Department of Defense for a second postponement of 60 days (R. 100, 101); that at the 11th hour, which, being on a Friday afternoon, was a very inconvenient hour, before the Commission's action was to take effect at 12:01 a.m. on the fol-

lowing Monday, the United States filed its complaint in the District Court seeking injunctive and declaratory relief (R. 1, 12), that not a single word appeared in either the complaint, the supporting affidavits, or the proposed written restraining order, about the prior proceeding before the Commission, or its decision therein, (R. 1-13), apparently out of fear that the question would be raised as to why the United States had not pursued its remedy before the Commission, and thence, if necessary, through the California courts; but that the local Assistant United States Attorney who presented the matter to the District Court apparently became aware of the Commission's decision in the prior proceeding and of its significance, and thereupon urged the District Court to take immediate action to arrest its effect (R. 265). He apparently believed that such action would maintain the *status quo*, and, therefore, urged it upon the District Court (R. 265).

The record further shows that counsel for the Commission then advised the District Court not only of the inconvenience to the Commission that would be involved in attempting to comply with a restraining order requiring affirmative action by the Commission, but also of the impossibility of obtaining the necessary action within the limited time available, and of the serious effect upon the rate structure that would follow upon any attempt the Commission might make to comply (R. 268, 269, 275, 276). Counsel for the Commission also advised the District Court more fully with respect to the prior proceeding before the Commission (R. 268-272), and pointed out that the United States could still fully protect itself by defend-

ing against suits by carriers for minimum or tariff rates (R. 270).

The District Court acknowledged that its order would cause confusion (R. 271); that the Government might have been dilatory in bringing the matter before the District Court (R. 271), and that the issuance of a restraining order would cause a "mechanical problem" to the Commission (R. 273), and cause financial loss to carriers (R. 273).

The District Court, however, persisted in its belief that a restraining order would maintain the *status quo* although advised by counsel for the Commission of the difficulties involved (R. 268, 273, 277).

The written restraining order issued by the District Court was entirely prohibitory in form, commanding inaction by the Commission (R. 11). The District Court orally stated, however, that the Commission was being ordered to take affirmative action to abate the effect of its prior order (R. 281).

Faced with the necessity of trying to resolve the ambiguity in the partly written, partly oral restraining order, and having no desire to run the risk of being in contempt of the District Court, the Commission, on Monday, December 5, 1955, sometime after 12:01 a.m., issued a new order countermanding its prior order (R. 102-104).

It has already been explained (supra, pp. 42-49) how a cloud of uncertainty was thus cast upon the rate structure for United States Government traffic in California, a cloud that will not be dispelled at least until the final determination of the present proceeding, and probably not for

many months or years thereafter, until a number of cases involving controversies over these rates have been tried and determined.

The most alarming feature of this sorry sequence of events is the Government's callous disregard of California's sovereignty as a state. First, the Armed Forces declined to cooperate in an attempt to remedy the serious abuses surrounding the transportation of its property. Then it appeared and participated actively in the proceeding before the Commission in which those abuses had appeared, and acquiesced in the Commission's proposed remedy for those abuses. Then, once more the Government changed its mind and sought the aid of a Federal court in nullifying what California had done. In taking this final step, the Government acted either in ignorance or in reckless indifference to the consequences to the rate structure. Its failure to say even a word in its complaint about the prior proceeding before the Commission indicates either that the Government was embarrassed by its participation in that proceeding and its acquiescence in the Commission's decision, or that it felt such a proceeding was beneath its notice, until it realized at the very last minute that enough attention had to be given to the Commission's order to get it countermanded. When that had been done, the Government then had the temerity to pretend that no such order had ever existed, and that the relief sought by the government was directed only against a statute (R. 156).

These events make it abundantly clear that the Government determined to repudiate its prior lawful conduct before the Commission, and to embark upon a course of

super-sovereignty, and to crush in the Federal court the offending state action, the provisions of the Tenth Amendment to the Federal Constitution, to the contrary notwithstanding. This is centralization and consolidation run riot. It is the erosion policy which, if upheld by this Court, will eventually extinguish all authority of the states in the field of commerce and trade.

It is equally deplorable that the District Court, either in haste or because of a too great receptivity to the representations of counsel for the Government, lent its assistance to this gross violation of the most elementary principles of comity existing between the State of California and the Federal Government.

This Court has frequently had occasion to express and apply the principle which requires that Federal Courts abstain from restraining, enjoining, or otherwise interfering with action taken by a State in the exercise of its sovereign powers. This principle is a corollary of the fundamental political principle underlying our dual form of government.

This "doctrine of abstention" has been well expressed by Mr. Justice Frankfurter in the case of *Railroad Commission of Texas v. Pullman Company* (1941), 312 U.S. 496, 500; 85 L. ed. 971, 974, as follows:

> ". . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . [citing cases]. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the

rightful independence of the state governments' and for the smooth working of the federal judiciary. [Citing cases.] This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

The principle was also applied in the case of *Alabama Public Service Commission v. Southern R. Co.* (1951), 341 U.S. 341; 95 L. ed. 1002, as follows (pp. 349-351; L. ed. pp. 1008, 1009):

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.

* * *

"This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. . .

> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

The doctrine of abstention was also invoked in the case of *Pub. Serv. Comm. of Utah v. Wycoff Co.* (1952), 344 U.S. 237; 97 L. ed. 291. In this case the late Mr. Justice Jackson said (p. 247; L. ed. p. 298):

> "Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system . . . We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 89 L. ed. 1725, 65 S. Ct. 1385. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. . . ."

Another case in which this doctrine was applied is *Public Utilities Comm. v. United Air Lines, Inc.* (1953), 346 U.S. 402; 98 L. ed. 140, in which United Air Lines, Inc., filed a complaint in the District Court against the Public Utilities Commission of the State of California, and in which *the United States (Civil Aeronautics Board) intervened as a party plaintiff*. The complaint alleged that the Commission was attempting to regulate commerce that was alleged to be within the exclusive jurisdiction of Congress. The requested declaratory and injunctive relief was granted in the District Court by a three-judge Court. On appeal to this Court the judgment was reversed by a *per curiam* decision upon the authority of the above cited case

of *Pub. Serv. Comm. v. Wycoff Co.* (1952), 344 U.S. 237; 97 L. Ed. 291.

The judicial policy underlying this doctrine of abstention is the same as the Congressional policy expressed by the Johnson Act, although not confined to cases in which the Johnson Act is applicable. (*Alabama Pub. Serv. Comm. v. Southern R. Co.* (1951), 341 U.S. 341, 350; 95 L. ed. 1002, 1009.)

Other cases that recognize and apply the doctrine of abstention are *Burford v. Sun Oil Co.* (1943), 319 U.S. 315; 87 L. ed. 1424, and *Spector Motor Service v. McLaughlin* (1944), 323 U.S. 101; 89 L. ed. 101.

For all of the foregoing reasons, the District Court should not have entertained the action but should have granted the Commission's motion to dismiss.

Instead, the District Court, in haste and without careful consideration of the consequences, frustrated the efforts of the State of California to remedy what was found to be "chaotic transportation conditions" in the large scale movement of government traffic at "depressed and unreasonably low rates," with the threat of a "burden upon other traffic."

The nullifying of such efforts with such a heavy hand was an infringement of the gravest character upon the sovereignty of the State of California, and resulted in incalculable confusion and damage to the transportation industry in California.

This offense was especially grievous because it was unnecessary.

II.

ANALYSIS OF RECORD SHOWING THE DISTRICT COURT'S ERRORS AT THE TRIAL, IN ITS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

Before taking up the matters that developed at the trial, the Commission desires to emphasize a point of fundamental importance in a consideration of what is to follow.

This case arose out of a challenge by the United States of the constitutionality of a particular California Statute, namely, the amendment of Section 530 of the Public Utilities Code. The Commission submits that the ultimate issue in the case is whether or not this particular statute is constitutional. The reasons for urging that the ultimate issue should be thus narrowed have already been suggested in part, namely, that the constitutional question can arise in various ways with a variety of aspects, and that it should be decided only in a specific context.

The Government, however, in numerous ways, which will be illustrated hereinafter, has made clear that it seeks to enlarge the frame of reference for this case and to challenge the constitutionality of *any statute whatever* that purports to empower a state to regulate, *in any manner whatever*, rates for the transportation of property of the United States, no matter how benevolent the statute may be or how little it would impinge upon the United States.

A. The District Court erred in overruling the Commission's objections to questions calling for expressions of opinion by the government witnesses upon the ultimate issues in the case.

At the trial, the Government immediately made it clear that it intended to throw the full weight and power of the military forces into its attack on state power. Its first witness was Edmond C. R. Lasher, Brigadier General,[15] United States Army, Assistant Chief of Transportation of the Army for Traffic, who represented the Department of Defense as well as the Army. He was followed to the stand by George A. Hall, Lieutenant Colonel, Transportation Corps, United States Army; Herbert C. Chambers, Colonel, United States Air Force; Gordon W. Bengtson, Lieutenant Commander, Supply Corps, United States Navy; Walter H. Eastham, Lieutenant Colonel, United States Marine Corps; Andrew Paul Flanagan, Lieutenant Colonel, Transportation Corps, Regular Army; and by the civilian assistants to these military officers.

As might be expected, considering the amorphous and contingent nature of the Government's case, the testimony of these witnesses consisted largely of alarums, loose generalizations, argument and inspired speculation.

As already stated, many of these witnesses were permitted, over objection by counsel for the Commission, to answer questions calling for expressions of opinion as to the effect of state rate regulation upon the United States military establishment. Such opinions were allowed and expressed although the witnesses admitted to having little or no knowledge of the California law, or of the conditions

[15]It is believed that General Lasher has been promoted to Major General since the trial of this case.

surrounding Government traffic in California. (R. 387, 388, 393, 394, 492, 596.)

It is not surprising that they predicted dire consequences to follow upon state regulation, as will be shown hereinafter.

The Commission does not propose to argue at length the narrow legal question of the admissibility of such evidence. The District Court's leniency, however, had harmful consequences, resulting in its being unduly alarmed and swayed by the zeal of these uniformed, high-ranking military officers, even though cross-examination made it clear, as will be demonstrated hereinafter, that there was little if any substance in the fears they expressed.

Thus, the District Court, opening its opinion with a ringing military note, quoted "To git thar fustest with the mostest men" as "the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader," and found the "wisdom in that dictum" still applicable "In this atomic age . . ." (R. 200.) The District Court then referred to the Government's "parade of witnesses whom we have found to be impressive," saying that "most of them were in the Department of Defense, one of them being a brigadier general of the Army," and that "those witnesses were most emphatic in declaring that the application of Section 530 to military freight shipments would be costly and time-consuming, and would have a 'chaotic' effect upon the defense activities of the United States." (R. 201.)

In another place, General Lasher was referred to as an "impressive witness," and a large part of his testimony

was quoted in the District Court's opinion, including dramatic but wholly irrelevant narratives of the General's experiences in Korea "as we raced north to the Yalu River," and his conclusion that state regulation would result in "an administrative *morass* out of which we would never fight our way, *we would never win the war!*" (Emphasis by District Court.) (R. 207, 210, 211.)

Colonel Hall was quoted as having testified with respect to state rate regulation: "Well, I can't imagine operating under such circumstances. *The situation in my office would be* COMPLETELY CHAOTIC * * *" (Emphasis and extreme emphasis by District Court.) (R. 215.)

Also quoted was his testimony about his "experience in Europe" with the methods of "a trained intelligence worker, espionage worker, ..." (R. 216.)

Reference was made to the testimony of Colonel Flanagan "giving only 'the skeleton facts' of a certain secret movement, *and which was still taking place at the time he was testifying.*" (Emphasis by District Court.) (R. 217, 218.)

All the other military officers were also quoted at length by the District Court in its opinion. (R. 218-221.) Thereafter, the District Court indicated very plainly the great weight it attached to the speculations of these military men by saying "How the application of Sec. 530 would 'hamper and hinder' the plaintiff in carrying out its Constitutional functions has been clearly shown by the testimony of high-ranking officers of the Armed Services." (R. 232.)

Having been thus conditioned and alarmed by the testimony of these witnesses, skillfully and dramatically

colored as it was by descriptions of war time emergencies, the District Court, near the end of its opinion, in distinguishing the case of *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania* (1943), 318 U.S. 261; 87 L. Ed. 748, said that "there is a constitutional difference between a can of milk and a hydrogen bomb!" (R. 235.)

In conclusion the District Court said, in part, "In a dictatorship, the war lords do not even *demand*—much less *request*—authority to negotiate with private parties for the supply of their war needs. Autocrats *take* what they want!

"It is therefore a heartening spectacle, in a Constitutional democracy, to see a group of military men, speaking for the sovereign itself, appear in a civil court to *plead* to be allowed to carry out their constitutional functions by being permitted to contract freely with privately-owned carriers to supply the Government's transportation needs." (Emphasis by District Court.) (R. 236, 237.)

It is not easy to define the peculiar quality of these words, but we respectfully suggest that they plainly manifest a misunderstanding of the true relationship which exists between the civil power and the military power. Could there be any possible question as to the subordination of these military officers to the authority of the Federal judiciary?

We can perceive no compliment due to military officers, however exalted in rank, for obeying the supreme law of the land and rendering themselves amenable to the lawful processes of the administration of justice.

B. The United States did not prove at the trial that it would suffer irreparable injury in the absence of injunctive relief.

At the time the Government rested, the Commission renewed its motion to dismiss on the ground that the Government had failed to make out a prima facie case (R. 619). The motion was again denied (R. 619). After all the evidence was in, the Commission once more renewed its motion (R. 724). It was again denied in effect by the District Court's Conclusions of Law I, II, III, and its Judgment (R. 253, 256); and the District Court's opinion and findings of fact make it clear that it found that the United States would suffer irreparable injury if the requested relief were denied, and would be unduly burdened by state regulation (R. 232, 234, 237, 247-252).

The Commission submits, however, that a careful analysis of the record, and a judicious weighing of the evidence will show no such injury or burden.

The substance of the reasons given by the Government witnesses for their opinion that state regulation of the rates of commercial carriers for the transportation of property of the United States would be harmful to the United States, may be fairly condensed as follows: (1) the increased cost of transportation thus regulated; (2) delay in transportation; (3) impairment of security. Additional, more vaguely expressed reasons were: (4) difficulty in distinguishing interstate and intrastate traffic; (5) Government traffic differs from commercial traffic; (6) California interests would suffer from state regulation; (7) the present system of negotiating rates is a good system; and finally (8) the mere existence of any state power whatever is onerous.

In considering the evidence pertaining to these grounds, it is important to bear in mind that the Government proceeded at the trial as if the amendment to Section 530 had never become effective, and a large part of the testimony of its witnesses consisted of *speculation as to what would happen* if state regulation should become effective.

Among the reasons given by the Commission in an earlier part of this brief for objecting to the District Court's entertaining the complaint, one was that the District Court did not have before it a specific context arising out of an actual specific transaction, or series of transactions, that had in fact occurred, and that would enable the District Court to see the actual effect of a specific state regulation. The soundness of this reason is abundantly demonstrated by an analysis of the "evidence" in the present case. Freed of the rigors that would be imposed by the necessity of testifying to the facts of actual transactions (except for a few carefully selected "examples"), and encouraged by the leniency of the District Court in its rulings upon objections to proposed testimony, the Government witnesses gave full rein to their zeal and imagination.

(1) The alleged increased cost of regulation.

The Government's evidence was that its transportation costs would be increased for the reasons that rates established by California for commercial shippers would produce higher charges than those paid by the United States under negotiated rates (R. 384, 447, 514, 531, 564, 574); that commodity rates would not be available (R. 378, 485);

that there would not be available any FAK[16] rates (R. 447, 512); that rates could not be made effective by the Commission retroactively, i.e., after moves had taken place (R. 406, 407); and that there would be a need for more personnel to classify and rate shipments under established tariffs (R. 385, 513, 535, 574).

Some of the evidence referred to above consisted of descriptions of certain shipments that had actually occurred and that were called "representative" or "typical" examples or "illustrations" of Government shipments (R. 531, 566, 567).

A close look at the evidence shows, however, that these shipments were not representative, but were deliberately selected in order to show, in extreme form, differentials between the charges computed under special rates and those computed under established rates. Thus, it appears that out of 11 examples of movements with respect to which lower rates were said to result from special rates than from established rates (R. 531, 532, 563, 567, 585, 586, 575, 576, 580, 581, 599), 7 were truck movements, of which 6 were performed by a single carrier, All State Transportation Company, although there are approximately 80-100 carriers engaged in carrying United States Government property in California and as many as 15,500 having operating authority to do so (R. 649, 693). Of the 3 movements selected, he said, "at random" by the Witness Broz, all 3 were performed by All State Transportation Company, although Mr. Broz testified that the

[16] "Freight all kinds", a single rate for a mixed shipment, i.e., one consisting of a variety of kinds of property (R. 452).

Air Force, which he represented, used 60 to 80 different carriers in California (R. 575, 576, 580, 581). All State Transportation Company is one of the principal rate cutters carrying Government property in California (R. 972-977).

The conclusion seems irresistible that All State Transportation Company's cut-rate hauls were purposefully selected, and are not by any means representative.

There is another remarkable feature about these allegedly "representative" shipments. Although 3 of the Government witnesses testified that subsistence (food) was the largest or one of the largest in volume of any kind of commodity shipped by the Government in California (R. 388, 432, 522), not a single example was offered to show a comparison between established and special rates for this kind of commodity. The Witness Stallings on cross-examination give away the reason why no such example was cited, which is that there is little if any difference between established and special rates for this kind of commodity. The following testimony of this witness is illuminating:

> "Q. You didn't feel it necessary to show a bill of lading respecting that kind of goods [i.e. subsistence food supplies]?
>
> A. No, because in most instances the commodity rate is very close if not the same as the rate tender.
>
> Q. Yes. It didn't suit your purpose to show one where the rate was approximately the same, did it, Mr. Stallings?
>
> A. We have examples where it's approximately the same. I don't happen to have them with me, but in our study we made quite a number of them. We were

trying to show you *representative shipments that would be affected by the minimum rate.*" (R. 568).

Commodity vs. Class Rates.

An important part of the testimony pertaining to the cost of transportation of Government property was concerned with the difference between commodity and class rates. The Government's witnesses repeatedly expressed the fear that under state regulation their traffic would become subject to class rates which produce higher charges than commodity rates, there being no established commodity rates available to the Government for its traffic (R. 378, 485). Several examples were given of shipments moved under negotiated rates that would have produced substantially higher charges under established rates (R. 563, 564, 599).

There is good reason to believe, however, that the Government has greatly overstated this fear of increased cost under regulation. In addition to the candid disclosure by the Witness Stallings already described the evidence shows that there are presently established in California "literally thousands" of commodity rates (R. 676). Many of these rates are presently available for commodities presumably shipped in large quantities by the Government, such as canned goods; paint; roof, building and paving materials; rubber goods; wire; plumber goods; soap; petroleum products; drugs; coffee; iron or steel goods; sugar (R. 984-986); and undoubtedly many more. These rates generally cover areas, and are not restricted to narrowly defined geographical points (R. 678, 679). The evidence shows, moreover, that in California, at least, large

quantities of Government traffic move between the same points as large volume commercial shipments, such as San Francisco-Oakland to Los Angeles (including Long Beach and San Pedro), and San Francisco-Oakland to San Diego (R. 510).

This evidence pertaining to presently established commodity rates, and the pattern of movement of large quantities of Government freight, sharply conflicts with the allegations of the complaint (R. 3), and with the testimony of some of the Government witnesses that Government traffic is different from commercial traffic (R. 370, 371, 445, 485, 569). The fact is that a large (but unknown) percentage of Government traffic has the same transportation characteristics as commercial traffic.

The observation just made suggests another serious deficiency in the Government's case, a deficiency that will be referred to again hereinafter. It is the failure to produce any kind of *comprehensive analysis and summary* of Government bills of lading that have actually been issued by carriers for California intrastate traffic over some recent representative period of time. The Commission submits that such a summary is absolutely essential to an understanding of the characteristics of Government traffic and how it would be affected by state regulation. Such a study would have disclosed, *among many other things,* to what extent, *presently established* commodity rates would be available to Government traffic. There is evidence that such studies were in fact made by the Government, *and for the very purpose of ascertaining how its traffic would be affected by regulation* (R. 569). *But these studies were not offered in evidence* as such; only selections were made,

to show "the places we would be harder hit" (R. 582), from which it is reasonable to infer that the studies as a whole would not have confirmed the allegations of the complaint. Nor would this be at all surprising. *With peace time conditions prevailing as at present*, there is a strong probability that a very high percentage of Government traffic is just like commercial traffic in terms of kind of commodity, termini, and availability of commodity rates.

It goes without saying that the burden was upon the United States as the complainant to produce such a traffic summary, and not upon the Commission as defendant.

But there is more to be said about commodity rates. If there are instances in which there are no presently established commodity rates for Government traffic, either because of the location of the termini or because of the nature of the commodity, the reason is, as explained by the Commission's Witness Mulgrew, that there has not heretofore been any need for establishing commodity rates for such traffic, which has in the past been exempt from regulation, and which has moved under special rates (R. 688). But that does not mean that suitable commodity rates for the Government could not or would not be established. On the contrary, the Witness Mulgrew, after explaining the theory of the commodity rate as being one established at a lower level than the class rate "where there are more favorable transportation conditions prevailing," stated in substance that the Commission in the past has been receptive to representations from interested groups who have requested the establishment of commodity rates; that a number of such rates have been established by the Commission; that such rates have been tailored to

suit the needs of commercial shippers for the reason that "We have not had any experience with Government traffic because, in effect, of the total exemption of that traffic from our rate regulation"; that there have not been any requests for the establishment of commodity rates for the United States Government, nor any reason to inquire into the reasonableness of any commodity rates for the Government; that the fact that some Government installations are located at a distance from a metropolitan center presents no reason whatever why commodity rates cannot be established for Government traffic to or from those installations; and that special rates could be approved without a public hearing (R. 687, 688, 693).

Of the remaining 4 of the 11 "representative" examples of Government shipments given by the Government witnesses, all were concerned with articles that only a military organization would ship in large quantity, viz., radar, tanks and heavy guns, mounted guns, ammunition (R. 563, 564, 585, 599), and it certainly would not be surprising that there are no established commodity rates for such articles, if that is the fact. The tanks and heavy guns moved from Camp Pendleton to 29 Palms, which is a desert training area in Southern California (R. 563), a fact which would make the absence of an established commodity rate, if that was the fact, even more understandable. The mounted guns, moving interstate from Ohio, and the small arms ammunition, moving from Arizona to Utah, were entirely irrelevant to a consideration of the effect of a California law upon Government traffic.

In the light of the foregoing, it will be seen that the "typical" examples of Government traffic given by the

Government witnesses to show the alleged high cost of regulation, are not only pitifully inadequate for that purpose, but also are grossly misleading in creating the impression that peace time Government traffic is all guns and no butter.

"Freight All Kinds" Rates.

The alleged nonavailability, under regulation, of FAK rates, was another reason expressed by a number of the Government witnesses for their conclusions that state rate regulation would unduly burden the United States. The peculiar advantages of such rates were said to be that they enabled the Government to consolidate large volume mixed shipments into truck load lots, without separately classifying the component items, and to move them at a single truck load rate uniformly covering all items in the shipment, thereby saving time and money (R. 452, 453, 460-462).

In order to demonstrate the increased cost said to result from regulation, and from the alleged nonavailability of FAK rates, the Government first offered testimony pertaining to the time needed by shipping personnel to perform the paper work involved in a shipment of Government property. Reference was made to "a study to see how much increased time it would take to do the paper work in order to comply with the Commission's minimum rate classification" (R. 533). Testifying as to "the results of that study" a Government Witness (McKinney) stated as follows:

> "A. The report received from the shipping activity indicates that it would take them an additional 13 hours *to completely describe* the various items on the

bill of lading for classification and rating purposes. In support of that I might explain our present method of billing under the freight all-kinds. For the rate to apply, the present rate tender, it is only necessary for the shipping activity to indicate *a brief generic description of the article, chiefly for identification purposes at destination,* checking with our invoices. This activity reports that it takes a maximum of four hours to prepare a bill of lading of this length, which contained 36 continuation sheets and 550 pieces, and by *completely describing*——

Q. How many pieces?

A. 550. *Completely describing* these various items *to comply with the classification description,* then, for rating purposes, they estimated it took 17 hours and 15 minutes, or 13 hours additional time." (R. 533, 534).

On cross-examination, the bill of lading that was the subject of this so-called "study" was produced, and it appeared that it was issued on February 29, 1956, upon a shipment originating at Naval Supply Center, Oakland, consigned to a naval repair facility in San Diego, California, consisting of 550 pieces, weighing 41,788 pounds, described as 218 items, on 36 pages, and accepted upon a special rate tender providing for a "freight all kinds" rate. This document was later offered in evidence by the United States and is a part of the record as Exhibit 6.[17] This exhibit consists of an office memorandum, dated February 29, 1956, "Subject: Classification Time Study," addressed to the Officer in Charge, Navy Central Freight

[17]Only portions of this document have been printed as a part of the record (pp. 774-777), but, pursuant to stipulation of counsel, the whole may be referred to (R. 987).

Control Office, from the Freight Terminal Officer, "in reply to your recent verbal request" (only a short time before the trial, which began on March 19, 1956 (R. 361)). The bill of lading referred to was attached as enclosure (1). Also attached to this office memorandum was enclosure (2) which showed, according to the Witness McKinney, that 17 hours and 15 minutes was necessary for "completely describing these various items to comply with the classification description."

There are good reasons for believing, however, that the Government overplayed this hand. In the first place, the bill of lading in question shows on its face that it is a Government Bill of Lading prepared upon Standard Form No. 1103a, a form approved by the Comptroller General of the United States; and that this form has printed under the words **"Description of articles"** the following instructions: **"Use carriers' classification or tariff description if possible, otherwise a clear nontechnical description."** The words "carriers' classification" plainly refer to those standard classifications such as the Western, Official, Southern Classifications, and National Motor Freight Classification, that have been filed with the Interstate Commerce Commission and other regulatory bodies, and widely adopted by common carriers for use in connection with their tariffs *and special rate quotations* (R. 630), and by state regulatory bodies for use in connection with minimum rate tariffs.[18]

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[18]For example, Item 50 of the Commission's Minimum Rate Tariff No. 2 provides as follows: "This tariff is governed to the extent shown herein by the Western Classification and the Exception Sheet."

It thus appears that Government practice requires that all Government freight to be shipped by common carriers be described in the terminology of the standard classifications where possible, and that only in unusual instances when the commodity in question cannot be described in such terminology is some other kind of description allowed. And there is good reason for this requirement. It enables the various regional freight control offices of the various shipping agencies of the United States, and finally the General Accounting Office, to make comparisons between established rates and special Government rates. Such comparisons are frequently made (R. 461, 462). The Comptroller General has ruled that the United States will not pay more than an established tariff rate if that is less than a specially quoted Government rate. 35 Comp. Gen. 681, relying upon *Missouri Pacific Railroad v. United States* (1931), 71 Ct. of Claims, 650, 661; *Illinois Central Railroad v. United States* (1923), 58 Ct. of Claims 182. *Moreover, most military traffic presently moves under established tariff rates* (R. 377, 395), *making it necessary to use descriptions contained in the standard classifications.*

It would seem, therefore, that the witness McKinney's method of using "a brief generic description" of the articles was a departure from standard Government practice. Whether or not this departure was authorized by his superiors does not appear in the record. In any event, Department of Defense regulations now require of procurement officers purchasing property "a complete description of the commodity being purchased, . . . *for subsequent freight classification purposes.*" 32 CFR, 1956 Supp., 1.306-4 (Appendix B, p. 21).

There is a further reason for doubting the conclusions of the Government witnesses with respect to this "study" of the bill of lading referred to above. Certain other bills of lading representing certain other Government shipments were received in evidence as Exhibits 3, 4, and 5 (R. 764-772; only portions of these exhibits have been printed as a part of the record). Descriptions of these shipments were offered by the Government not for the purpose of showing how long it took to do the paper work but for another purpose that has already been referred to above, namely, to show how much more the Government would have to pay under rate regulation. But it was necessary, nevertheless, to classify the items in these bills of lading by reference to the appropriate standard classification, in order to ascertain the charges resulting from the application of established rates; and these exhibits show how much time was spent in such classification.

It is very instructive to compare these classification times with the classification time shown on Exhibit 6. Thus, Exhibit 3 shows a total of 94 items, and 25 minutes as "man hours spent in classification, NCFCO,"[19] or approximately 3½ items per minute. Exhibit 4 shows a total of 171 items and 2 hours and 50 minutes classification time by NCFCO, or approximately 1 item per minute. Exhibit 5 shows a total of 30 items and 10 minutes classification time by NCFCO, or approximately 3 items per minute. The average for these 3 bills of lading was approximately 1½ items per minute. On the other hand Exhibit 6, the basis of the "classification time study,"

[19]Navy Central Freight Control Office.

shows 226 items on enclosure (2), and 14 hours for classification by NCFCO, or approximately *3½ minutes per item*. This means that it took more than 5 times as long to do each item for the "study" as for those items that were classified in the other bills of lading for another purpose.

Yet it is this "study" that served as a basis for the conclusion of the Witness Bengtson that under rate regulation shipping activities "would be required to beef up their sections where they classify the shipments" by "approximately 50 per cent" at an additional cost of "approximately $25 a truck load" (R. 513, 514).

Commander Bengtson's zeal carried him even further. He said that "these 13 hours [i.e., those reflected by the "study" as additional hours needed for classification] represent strictly operating hours before the shipment could get underway, and those additional man hours represent for all purposes a delay before the shipment could be made"; that such a delay might be "crucial for operational purposes in the Navy"; and that it might result in a ship's not sailing, or "leaving port without the items on board" (R. 513).

Although much of what the Government witnesses said about FAK rates is misleading, the subject is an important one and needs to be examined with care. There is no doubt that carriers have quoted FAK rates to the Government and that such rates have been used to a substantial extent in calculating charges for transportation of Government property. But this is another area in which no reliable information has been presented by the Government. The record does not show the proportion of the

total Government traffic in California to which FAK rates are presently being applied, and so it cannot be ascertained from this record what is the extent of the benefit the Government presently derives from these rates. (See Record pp. 668, 669.) This is another deficiency in the Government's proof that might have been supplied by the kind of comprehensive analysis and summary of Government bills of lading that has already been referred to above. As presented, the Government's evidence was grossly inadequate to show irreparable injury from being deprived of the use of FAK rates. Moreover, the Government's case assumes that it would be permanently deprived of FAK rates for all purposes under California regulation, an assumption that has no basis in fact.

To whatever extent FAK rates may be presently used, and whatever may be their merit or evil in principle, the evidence shows that in practice they have been abused, not only in California but elsewhere as well. The Witness Loretz, called by the Commission, testified at length upon a study he had prepared pertaining to FAK rates in California (R. 633-644, 971-982). He showed how there has been a steady deterioration of FAK rates between certain important shipping points in California since October 1953, a period of time when the rates prescribed by the Commission as minimum were increasing in response to the increased cost of carrier operations (R. 640). He made it plain that he was not unqualifiedly condemning the principle of the FAK rate, and that he thought such rates had some merit as applied to military traffic, making it possible, for example, to move, at a single rate, an entire division with its military impedimenta, where the carrier would take the high rated articles along with the low

rated, and it would average out (R. 638, 639); but that FAK rates had been abused by the Government and carriers in California by applying them to shipments for which they were not appropriate; that the Government has taken advantage of low *established* commodity rates when they are available for low rated Government commodities, such as canned goods or iron and steel, and made use of special reduced FAK rates for high class freight such as circuit breakers and scientific instruments which appeared in one of the actual shipments offered by the Government as an example (R. 645, 646, 666, 667).

It seems clear from the testimony of this witness that it was the serious abuse of FAK rates in California that led to the commencement of the proceeding before the Commission in 1954, and that it was the Government's desire to continue its enjoyment of these depressed rates that led to this litigation.

Some of the Government witnesses, including General Lasher, admitted that there are abuses attending the indiscriminate use of special rate quotations induced by competition (R. 422). General Lasher also added "this abuse is very difficult to eradicate" (R. 422).

Retroactive Rates.

A number of the Government witnesses described the advantages to the Government in the privilege of negotiating special rates with carriers after movements had taken place, with the understanding that such rates would be effective retroactively, thereby avoiding the application of an established rate that might produce higher charges (R. 406, 407, 586, 597). It is not denied that such a privi-

lege is a valuable one, and a desirable one under certain circumstances, as for example, where a rate has not previously been established and where time is of the essence and does not permit the negotiation or establishment of an appropriate rate before a move takes place. But it seems very probable that such movements would be limited to occasions when, as a result of a decision by a military commander, transportation was needed at an unexpected time, or to an unexpected place. *In peace time*, such movements probably do not represent a very large percentage of the over-all Government traffic. Again, the Government has not supplied any data from which reliable conclusions can be drawn.

In any event, conceding that retroactive rates are peculiarly advantageous to the United States in certain circumstances, *there is no reason to believe that the Commission cannot or would not authorize them.* The Commission's Director of Transportation, the Witness Mulgrew, stated that he recognized in Section 530 of the Public Utilities Code, as amended, a legislative policy to give the United States Government, as well as state and local governments, preferential rates, and that in his opinion rates for Government traffic could be made effective retroactively just as under the present system (R. 687, 689).

At least, the California Supreme Court should be given an opportunity to pass upon the question, if there is any doubt about it. This is an important instance of the need, as discussed in an earlier part of this brief, of permitting the California Supreme Court to interpret the California statute, and to pronounce authoritatively upon the extent of the Commission's powers thereunder.

Need for More Personnel.

The use of Exhibit 6 by the witness Bengtson as a basis for his opinion that rate regulation would require an increase in personnel and cost, has already been discussed. Other Government witnesses expressed the same opinion, with no better foundation (R. 385, 535, 574).

The fact of the matter is that modern transportation is a complex business, and it is not at all simplified for the Government by the use of special rate quotations. General Lasher's testimony and other evidence in the record show that the various agencies of the United States Government, *under the present system,* maintain large transportation organizations, including staffs of skilled rate men, making use of tariff libraries containing thousands of tariffs and special rate quotations (R. 396, 397, 405, 503, 578, 915-920). Many special rate quotations are constructed in the same form as established tariffs, containing explanations of abbreviations and technical terms, references to governing publications, sections indicating the application of the rates, and providing for ancillary service, such as dunnage, extra labor, etc., minimum charges, restrictions in routings or service, exceptions to the governing classification, a class rate section, a commodity rate section and FAK rates (R. 629-631).

So far from simplifying the task of rating Government shipments, the availability of special rate quotations is far more burdensome to Government personnel responsible for routing and rating shipments than would be the non-availability of such rates, for the reason that under the present system such personnel are required to use the lowest available rate, whether it is to be found in an

established tariff or in a special rate quotation, and are therefore required, as General Lasher admitted, to be familiar with, and be able to use, both types of publication (R. 397).

(2) The alleged delay in transportation under regulation.

A number of the Government witnesses expressed the opinion that rate regulation would cause delays in Government transportation. Reference has already been made to Commander Bengtson's absurd statement that the sailing of ships might be prevented or delayed by the necessity of classifying commodities by reference to the standard classifications. Even more absurd was the opinion expressed by Colonel Hall that under rate regulation, the Government would have to come to the Commission *before making* a certain move involving ammunition boxes (R. 459). Colonel Chambers, although admitting he was not a transportation expert, dramatically emphasized the need for speed in the Air Force and said that interference with such speed by state regulation could not be tolerated (R. 496, 499, 502). On cross-examination, however, he showed much confusion in his understanding of the problem by saying that *under regulation* "We would be *required to negotiate* most of our shipments, the rates of our shipments. That in itself would constitute a delay, which in the Air Force we could not tolerate." (R. 505). Colonel Eastham said California regulation "would require a slow down in our movement of freight. It would cause, as has been explained here, time after time, that the classification would be required." (R. 560).

The Government witnesses never succeeded in making clear just how regulation of the rates of carriers would cause delays in the transportation of Government property. And the Government witness McKinney, who, testifying on his direct examination in support of the so-called classification time "study", said that it showed that 13 additional hours would be needed in order to meet the requirements of the standard freight classification, and that "during all of these additional 13 hours required for this additional work, that shipment would still remain on the shipping activity floor * * * before you could give routing instructions to the shipping activity", finally admitted as follows, on cross-examination:

> "Q. In those cases where the shipment is urgent, under those circumstances you would not allow the shipment to remain for 13 hours, would you?
>
> A. No, not in every case; no.
>
> Q. You would ship it out first and [ascertain] the rate later, wouldn't you?
>
> A. We could take out these urgent items and ship them and hold the remainder.
>
> Q. So that for those shipments with respect to which time is of the essence, the rating process is not permitted in your present practice or contemplated practice, to hold back a shipment, is it?
>
> A. Generally speaking, no." (R. 533, 534, 548-550, 552).

(3) The alleged impairment of security.

A third reason expressed by many of the Government witnesses for their objection to rate regulation was that such regulation would impair the national security by requiring disclosure of information pertaining to the

movement of classified materiel (R. 384, 417-420, 450-452, 490, 514, 515, 534, 561, 565, 576-578, 599-602).

The Commission desires at once to emphasize that it is fully aware of the necessity of preserving the national security, and has no intention or desire to promulgate any rate, rule or regulation whatever that would tend to undermine that security. The Commission concedes that there are movements, from time to time, of highly sensitive and classified articles with respect to which shipping data should not be disclosed. Nor does the Commission have any intention or desire to substitute its judgment for that of responsible Federal officers in determining what transactions involve the national security. The Commission desires also to state to the Court the opinion of its Chief Counsel that under Section 530 of the Public Utilities Code, as amended, it has the power to grant complete immunity from regulation of any kind to the transportation of any and all property of the United States which, in the opinion of responsible Federal officers, involves military or national security.

If there is any doubt about such power under the statute, then at least the California Supreme Court should be given an opportunity to say whether or not such power has been thus granted to the Commission.

Nevertheless, the Commission cannot forbear suggesting that the military officers who testified for the Government in the District Court overstressed the danger to security that would follow upon rate regulation. Colonel Hall, for example, said that "really over a period of time every military shipment is in a sense a security shipment", and,

to prove his point, referred to his "experience in Europe" and to the methods of "a trained intelligence worker, espionage worker", although he had previously testified, with respect to the depot for which he was responsible, that "one of our big businesses at Sharpe General Depot is canned goods—subsistence" (R. 431, 432). It is difficult to understand how movements of canned goods between military installations in California *in peace time;* can involve the Nation's security.

Furthermore, it ought to be pointed out that the Government witnesses described several ways now in use, which would also be available under rate regulation, to effectuate the movement of classified materiel without any disclosure of shipping information to unauthorized persons.

One method was the use of military vehicles (R. 418, 419); another was the outright leasing of vehicles from commercial carriers (R. 418); another was the so-called exclusive use rule presently contained in commercial tariffs, which, like a lease, would give the Government exclusive use of commercial vehicles (R. 661).

In any event, whatever may be the nature and volume of the movement of classified materiel, and whatever methods may be available to the Government to avoid violations of security, there is no valid ground for fearing that the amendment to Section 530, or Commission action thereunder, presents a threat to the Nation's security in view of the avowed intention of the Commission's chief counsel to advise that the Commission can completely exempt security traffic from regulation (R. 700, 701).

(4) Interstate vs. Intrastate Traffic.

The necessity of recognizing, under regulation, the legal distinction between interstate and intrastate transportation was given by some of the Government witnesses as another reason for opposing such regulation. It was said that large quantities of goods come to California from outside the state, and that large quantities originating in California are transported outside the state; and that goods originating from various sources, both within and without the State of California, are commingled in depots and not segregated by points of origin (R. 435, 436, 439, 440). These things are doubtless true, but it is not understood how they present any obstacle to California regulation of the rates for transportation between points in California. It was said that it was difficult to distinguish between interstate and intrastate traffic (R. 383, 439, 440). Apparently the Government witnesses were laboring under the misapprehension that if an article is produced outside California then any subsequent movement of it whatever in California is intrastate in character. Thus, General Lasher said "We do not know when an item starts out on its journey from the processor whether it is going to be consumed in North Dakota or Florida or Cambodia." (R. 383). The General seemed to look upon interstate character as something that irrevocably attaches to an *item* under certain circumstances, and which can never be lost thereafter, rather than as an aspect of a particular transportation *movement*. Colonel Hall expressed the same idea when he said "We do not know what our materiel is. As stated, we have our interstate and intrastate materiel so commingled

that we could not possibly segregate it.", and that to determine "what materiel was in fact interstate and what was intrastate" for purposes of Commission rate regulation, "would just be impossible at the present time." (R. 441, 442). These witnesses apparently were not familiar with the principle laid down by this Court in cases like *Gulf, Colorado & Santa Fe R.R. v. Texas* (1906) 204 U.S. 403; 51 L. ed. 540, and *Baltimore & Ohio R.R. v. Settle* (1922) 260 U.S. 166; 67 L. ed. 189, which make it clear that when property has been carried from one state to a point in a second state where the carrier relinquishes possession, and thereafter the property is carried to another point in the second state, the second movement is in intrastate and not interstate commerce. Whether or not the property is commingled, during its period of rest in the second state, with other property originating within the second state, is immaterial. As could be expected, Colonel Hall was unable to point out any California law that would require segregation of property according to origin point (R. 454).

However extensive the practice may be of commingling goods in depots, without respect to their points of origin, a segregation takes place when goods are appropriated to a specific requisition (R. 526, 527), and thereupon the interstate or intrastate character of a contemplated shipment is ascertained. Under rate regulation, the applicable rate could thereupon be likewise ascertained.

It is true that once in a while commercial shipments are made under such circumstances that it is not easy to determine whether the transportation was in interstate or intrastate commerce, and, therefore, whether rates estab-

lished by the Interstate Commerce Commission or by a state regulatory agency are appropriate. And it is possible that such shipments are made by the Government from time to time. But the number of such shipments is probably not large in proportion to the total shipments made by the Government, and in any event the staffs of skilled rate men presently maintained by Government agencies, and the General Accounting Office, and finally, if necessary, the Federal Courts, should not find these occasional problems insoluble.

"Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent." *Davies Whse. Co. v. Bowles* (1943) 321 U.S. 144, 153, 154; 88 L. ed. 635, 642. The case cited was decided while World War II was in progress, but even the emergency conditions then existing were not considered sufficient to make it necessary to brush aside the public utility rate-making power of the State of California.

The Government apparently has solved, without too much difficulty, another problem arising out of the need for distinguishing between interstate and intrastate transportation. Although General Lasher first said that "it has not been necessary for us to distinguish between intrastate and interstate traffic up until a relatively short time ago", and that normally the Department of Defense is not concerned with the question of whether traffic is moving in interstate or intrastate commerce (R. 388, 389), on cross-examination it developed that the Department of Defense had prescribed the use of a form printed No-

vember 1, 1952, which requires all carriers desiring to do business with Department of Defense agencies to disclose in detail the nature and scope of their operating authority from both the Interstate Commerce Commission and state regulatory agencies (Exhibit A, R. 861). The regulations prescribing this form (32 CFR, 1956 Supp., Secs. 212.1 through 212.3, Appendix B, p. 25) state that it is to be used by the military departments in securing "certain essential information from motor common carriers." The importance of such information was further emphasized by the Government in the brief it filed on the Commission's motion to dismiss (R. 149). Obviously, it is necessary to know whether a contemplated move is in interstate or intrastate commerce in order to know whether or not an interested carrier has the proper operating authority, unless use is made of the Marine Corps' expedient of employing, where possible, in case of doubt carriers with both types of operating authority (R. 561).

It would seem from what has been said that the Government has been able to accommodate itself to state regulation of operating authority, and to find means of distinguishing between interstate and intrastate traffic in order to conform to such regulation, but its representatives profess to have difficulty in making such distinction for the purpose of ascertaining the applicable rate.

(5) The alleged difference between Government traffic and commercial traffic.

It was said that Government traffic is different from commercial traffic in that commercial traffic forms a pattern while the requirements of the military are dictated

"by forces outside of the United States"; that military traffic moves "opposite to the flow of commercial or industrial traffic"; and that the military ships "all of the materiel and machines of war." (R. 371).

Whatever may have been intended as the significance of these distinctions, the fact is that they are not valid, at least not in California, and they conflict with the Government's own evidence, already referred to, that the Navy's greatest volume of traffic is between the commercial and industrial areas of San Francisco-Oakland and Los Angeles (including Long Beach and San Pedro), and between San Francisco-Oakland and San Diego (R. 510); and that one of the biggest businesses at the Army's Sharpe General Depot is in canned goods or subsistence items (R. 432). It appears also that there is automatic requisitioning or issue of "consumables" (R. 399, 402, 466); that a large portion of the military installations to which shipments move from Sharpe General Depot are located on or near major highways (R. 466); and General Lasher, as well as other witnesses, made it clear that the military forces ship, in addition to the engines of war, quantities of "the usual things that move in commerce today—we ship shoe strings, toilet soap and eggs . . ." (R. 371, 881, 889).

Here again is an instance of the desirability of a comprehensive analysis and summary of Government traffic. Such a summary would show what percentage of all the property shipped by the Government is of the same character as property shipped by commercial enterprises, and what percentage is property of a character peculiar to military organizations.

(6) The implied prejudice to California from rate regulation.

General Lasher said that if state rate regulation became effective "we would probably have to rearrange our entire depot system." (R. 386). Other witnesses joined with him in saying that more traffic would be routed over interstate routes (R. 386, 473, 474, 489). Colonel Hall said that greater use would be made of the privilege of transit (R. 472).

It is not altogether clear what is the significance of these forebodings. Apparently, they were intended to suggest either that California interests would suffer if rate regulation became effective, or that the Government would incur added expense. But the Government does not seem to have attached much weight to them, and it does not seem necessary to say more, if the Government is concerned about California, than that the Legislature of California is probably the best judge of its interests.

(7) The alleged merit of the present system.

Several of the Government witnesses professed to find the present system of using special rates for Government traffic a good and efficient system (R. 422, 575, 587, 606).

They clung to this opinion even after conceding that there are abuses attending the present system, and in the face of conclusions reached by the Interstate Commerce Commission, the Presidential Advisory Committee on Transport Policy and Organization (the Weeks Committee), the Commission on Organization of the Executive Branch of the Government (the Hoover Commission) and the Subcommittee on Transportation of the Hoover Commission, that there are numerous abuses and inefficiencies

attending the present system (R. 422-429, 579, 580, 588-591, 606-612, 865-957).

General Lasher, although testifying as a representative of the Department of Defense, even felt constrained to disagree with his superior, Secretary of Defense Charles E. Wilson, who was a member of and subscriber to the unanimous report of the Weeks Committee (R. 426).

(8) The mere existence of any state power whatever is onerous.

Finally, two of the Government witnesses on cross-examination disclosed their most deep-seated motivation, which was an instinctive aversion to the mere existence of any state power whatever. Their statements are revealing. After expressing his belief that the Commission would be "most receptive" to representations that certain types of Government traffic should move at reduced rates, General Lasher then added "But the mere fact that we would have to make such representations is to me the crux of this." (R. 409). Again, upon being asked if his anxiety would be allayed if the Commission should, upon proper representations, authorize carriers to make rates effective retroactively, the General replied "Partially—not wholly, because the power would still flow to the Commission. The power would still flow to the Commission, in my opinion, and therefore still be a threat." (R. 412, 413). Colonel Hall was asked why, in view of the Commission's power under Section 530 to authorize transportation for the United States free or at reduced rates, he was so certain he would automatically be required to pay minimum or established rates if the District Court's restraining order were not in effect. His answer was "Well, perhaps I am just looking at the worst possible picture." (R. 454).

It has already been stated that the Government in numerous ways has made it clear that it considers the issue here to be national in scope, and to involve the question of the right of any state to regulate in any manner whatever the rates of carriers for the transportation of property of the United States (R. 150, 413).

A number of its witnesses, therefore, including General Lasher, admitted to having little or no familiarity with the conditions surrounding the transportation of Government property in California, and to have made no attempt to inform themselves before coming to California to testify (R. 387, 388, 393, 394, 492, 595, 596).

The Commission respectfully submits that these admissions, without more, are sufficient to seriously impair, if not wholly discredit, the testimony of these witnesses about the effect of Section 530 of the Public Utilities Code upon the interests of the United States.

The Commission has attempted, in the preceding pages, to set out and to evaluate all of the reasons expressed by the Government witnesses for their conclusion that California regulation of the rates of carriers for the transportation of property of the United States would hamper and injure the United States.

It is respectfully submitted that their reasons were wholly inadequate to support that conclusion.

The findings of fact of the District Court, being based upon such evidence, were "clearly erroneous", and therefore may be reversed by this Court. *U. S. v. U. S. Gypsum Co.* (1948), 333 U.S. 364, 395; 92 L. ed. 746, 766.

In order to show how little the transportation of Government property would be affected by the amendment to Section 530 of the Public Utilities Code it seems desirable to set out here an integrated description, based upon what is believed to be uncontroverted evidence of record, of the organization, methods and practices of those Government agencies, and of those commercial carriers, concerned with the transportation of Government property.

It appears that each branch of the Armed Forces maintains regional offices for the purpose of supplying to local shipping activities various traffic management services, including routing and rating (R. 915-920). These regional offices are equipped with staffs of skilled rate men, and with tariff libraries consisting of thousands of tariffs and special rate quotations (R. 396, 397, 405, 503, 578).

In practice, an important distinction is observed by Government transportation personnel between large volume and small volume moves. On small volume moves, i.e., less than carload (LCL), or less than truckload (LTL), or less than 10,000 pounds, local transportation officers are authorized to route the shipment without first consulting the regional office (R. 405, 940, 943, 945-947). For large volume moves, however, involving car load or truck-load quantities, local transportation officers are required to obtain route and rate information from a regional office (R. 405, 940, 943, 945-947).

There is another important distinction, observed in practice by Government transportation personnel, between those moves for which time is of the essence and those for which time is not an important factor (R. 400).

A method frequently used for making reduced rates available to the Government is that of various tariff publishing bureaus in preparing Government rate tenders after agreement among a number of carriers participating in the tariffs published by those bureaus, and in submitting such tenders by filing them with each of the military services in Washington (R. 626, 627). Such rate tenders are also made from time to time by the tariff publishing bureaus for the account of a single carrier, the practice being in such cases for the tariff publishing bureau to notify other carriers participating in that bureau's tariff publications (R. 627). Rate quotations prepared in these ways are printed in tariff form (R. 627).

Another method is for individual carriers to file special rate quotations with Government agencies without the medium of a tariff publishing bureau. Copies of some, but not all of such quotations, are sent by the military agencies to tariff agents and to other interested carriers (R. 632, 635, 636).

As a result of these practices, there are on file with Government agencies, at any given time, thousands of special rate quotations which have been made available to the Government *for substantial periods of time in advance of* movements that may later be governed by such quotations. When moves are contemplated, from time to time, for which no special rate quotation and no appropriate established rate is available, then the practice of the Government agencies is to negotiate with a carrier or group of carriers, or with a representative of carriers, for special rates for such moves (R. 377, 584). If time is of the essence, the move takes place and the rate is negotiated and agreed

upon afterwards (R. 406, 585, 597). Otherwise, negotiation and agreement precede the move (R. 406).

When Section 530 of the Public Utilities Code is considered in the light of the foregoing anaiysis of the evidence, certain conclusions are irresistible. A large area of Government traffic, namely, LCL-LTL, would not be affected *at all* by regulation, since it presently moves at established class rates.

Another large area, namely, traffic for which appropriate commodity rates are presently established and presently available to Government traffic, such as those on canned goods, petroleum, iron and steel goods, sugar and coffee, likewise would not be affected *at all* by regulation.

There is another area of Government traffic suitable for the application of commodity rates for which there may not now be established commodity rates, but for which such rates could quickly be authorized by the Commission without a public hearing. Such traffic would not be adversely affected by regulation provided the interested parties took the necessary steps to obtain Commission authority. Presumably, these steps would be taken by the tariff publishing bureaus on behalf of the carriers, and would not necessarily add much more time or effort to the filing with Government agencies of reduced rate quotations than at present. Presumably, also, such tenders would be prepared and Commission authority obtained where appropriate, and the tenders filed with Government agencies *in advance, as at present,* of moves that would be governed by such special rates.

Shipments for which time is of the essence and which must move before a suitable rate could be authorized,

would not be adversely affected if the Commission should exercise what appears to be a clearly granted power to make rates for Government traffic retroactive.

Shipments of classified materiel, or requiring the preservation of military security, which, for some reason in the opinion of responsible Federal officials, should move by vehicles under the control of commercial carriers, could be made the subject of a blanket exemption by the Commission, and thereby remain unaffected by regulation.

There remains only the traffic now moving at FAK rates. In view of the history of these rates in California, the Commission desires to refrain from any commitments as to what it would do about them in the event its hands are untied. It has already found, after extended public hearings, that serious evils surround the transportation of Government property in California. Additional evidence of such evils, adduced at the trial in the District Court, has been referred to, evils of so grave a nature as to cause the witness Loretz to say "I have never witnesse[d] any depression of rates or rate-cutting in the face of rising costs such as has prevailed on this Government traffic." (R. 652). There is extensive evidence that the use of FAK rates is a major evil (R. 422, 645, 646, 666, 667).

It will be recalled also that a number of the Government witnesses admitted that there are abuses attending the present method of procuring transportation of Government property, and that General Lasher said that they are hard to eradicate. One of the principal reasons why they are hard to eradicate is to be found in the policy of the General Accounting Office which, after stating that "the bargaining for rates or the playing off of one carrier

against another by Government procuring officials, where it is known to the Government negotiators that such procedure is destructive of the ability of the competing carriers to function, is not justified," continued by saying that "It is not understood, however, how administrative officials of the Government can assume to determine that rates voluntarily tendered by the carriers should be rejected because, in the opinion of Government personnel involved, the rates may not be sufficiently productive of profitable revenue"; that "it was and is the considered opinion of the General Accounting Office that *traffic managers of the Federal Government are not charged directly with responsibility for the enforcement of the national transportation policy* and that any attempt on their part to give it effect in procuring services at proper rates for the Government would result in uncertainty and confusion in the award of Government business, with understandable protest and objection from the carrier or carriers tendering rejected lower rates"; and concluded that "this Office will endeavor to see that payments made for services procured at reduced rates are audited *in conformity with the reduced rates tendered and accepted*" (R. 963, 964).

In view of the overwhelming evidence of the existence of serious abuses surrounding the procurement of transportation of Government property in California, and in view of the renunciation by the General Accounting Office of any responsibility of Government procurement officers for insuring reasonable earnings to carriers of such property, the Commission believes it owes a duty to the people of the State of California to carefully scrutinize the rates and practices of those carriers, and particularly FAK rates.

In the light of the foregoing, the Commission respectfully submits that the District Court erroneously found and ruled that the Government would suffer irreparable damage and be hampered, delayed and endangered in the exercise of its constitutional responsibilities by the application of Section 530 of the Public Utilities Code; that the District Court should not have granted either injunctive or declaratory relief; and that the judgment below should be reversed with instructions to dismiss the complaint.

III. THE DISTRICT COURT'S FINAL JUDGMENT ON THE ULTIMATE QUESTION WAS ERRONEOUS.

The Commission hopes and believes that the Court will not find it necessary to reach in this proceeding the ultimate question involved, namely, whether the amendment to Section 530 of the Public Utilities Code was a lawful exercise by the State of California of the police power reserved to the states by the Tenth Amendment of the Constitution of the United States.

If, however, the Court should be of the opinion that it should entertain and decide this ultimate question, on this record, then the Commission offers the following argument which it believes will persuade the Court that the enactment of the statute was a lawful exercise of the police power.

The Penn Dairies case.

A case of paramount importance in a consideration of the ultimate question involved in the present case is *Penn Dairies, Inc. v. Milk Control Commission* (1942) 318

U.S. 261, 87 L.ed. 748. In this case, a milk distributor sold milk in Pennsylvania to the United States Army at a price lower than that fixed as minimum by an agency authorized by the State of Pennsylvania to fix prices for milk sold within the state. The agency, therefore, denied a new license to the distributor. This denial was sustained by the courts of Pennsylvania, *in which the United States Government was allowed to intervene*. On appeal, this Court affirmed the judgment.

In the cited case, the Court discussed at length the matters to be considered and the principles to be applied to cases like the present one.

On pages 268-271 (L. ed. 753-754) it was said:

> "Appellants urge that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.
>
> "Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article 1, § 8, cl. 12, and with the support of the supremacy clause, Article 6, § 2, could declare state regulations like the present inapplicable to sales to the government. [citing cases] But there is no clause of the Constitution which purports, unaided by congressional enact-

ment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

"We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. [citing cases] But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, [citing cases] and *the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation.* [citing cases]

"Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 PA Super Ct 270, 271; 24 A (2d) 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin v. G. A. F. Seelig, Inc.* 294 US 511, 79 L ed

1032, 55 S Ct 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, 314 US 1, 88 L ed 3, 62 S Ct 43, 140 ALR 615, supra; *or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & A. R. Co. v. Lichtenberg*, 176 Md 383, 4 A(2d) 734 supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co. v. Sadrakula*, 309 US 94, 84 L ed 596, 60 S Ct 431, 127 ALR 821.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy v. Mitchell*, supra (269 US 523, 524, 70 L ed 392, 393, 46 S Ct 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the

Constitution which established the system, see *Graves v. New York*, 306 US 466, 483, 487, 83 L ed 927, 937, 59 S Ct 595, 120 ALR 1466.

"Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. * * * Our inquiry here, therefore must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy."

The Court then pointed out (p. 271; L. ed. p. 754) that in order to show such a conflict, the United States Government relied on certain acts of Congress requiring competitive bidding in the purchase of supplies for the Army. The Court then proceeds to examine these statutes and concludes (pp. 272-273; L. ed. p. 755) that:

"* * * while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, * * *"

The Court continues as follows (pp. 274, 275; L. ed. p. 756):

"Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. * * * "

On page 275 (L. ed. p. 756), the Court said:

"Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government, *For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.*"

The Court then refers to the United States Government's reliance upon a certain Army regulation in effect at the time of the sale in question containing certain instructions to contracting officers, and said (p. 276; L. ed. p. 757) that the statutes authorizing the Secretary of War

to prescribe rules and regulations for procurement "give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price."

The Court concludes its opinion as follows (p. 278; L. ed. p. 778):

> "We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity. It follows that the Pennsylvania courts rightly held that the Constitution and laws of the United States did not preclude the application of the Pennsylvania Milk Control Law to appellant Penn Dairies, Inc., by denial of its license application."

This case describes two inquiries to be made in cases like the present, viz., (a) whether the state regulation in question is prohibited expressly or impliedly by any clause of the Constitution of the United States, and (b) whether such regulation conflicts with Congressional legislation or with any discernible Congressional policy.

A. There is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit the regulation by states of the rates of commercial carriers for the transportation of property of the United States; nor is any such prohibition to be implied from the relationship of the two Governments established by the Constitution.

This conclusion is required in the present case for the same reasons as those which obtained in the *Penn Dairies* Case. Even assuming that California's regulation of the rates of commercial carriers of property of the United States would impose an increased economic burden on the Government, that is not sufficient to bring such carriers within any implied immunity of the Government from state regulation.

The District Court was clearly wrong, therefore, in ruling that "The regulation of the rates for the shipment of military materiel intrastate by the several States would so drastically hamper and interfere with the officers of the United States in the discharge of their responsibility of supplying the defense establishments and related activities and would so endanger the security of the United States that State statutes conferring such power upon State regulatory bodies would be unconstitutional and void as contravening the provisions of the United States Constitution relating to the national defense *in the absence of any act of Congress.* Such State statutes would be valid only upon the condition that Congress enacted a statute expressly authorizing the various States to regulate such rates." (Ruling VII; R. 254).

B. The amendment of Section 530 of the Public Utilities Code does not conflict with Congressional legislation or with any discernible Congressional policy.

The District Court ruled that "By section 22 of the Interstate Commerce Act, 24 Stat. 387, the Armed Services Procurement Act, 41 U.S.C. section 151(c), the Federal Property Administrative Services Act of 1949, Public Law 1952, 81st Cong., 1st sess., sections 201 and 202, 63 Stat. at page 377, Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be by contract and special arrangements and not subject to regulation by Commissions and other bodies vested with the power of regulating the rates for the transportation of property generally." (Ruling VI; R. 254).

(1) Section 22 of the Interstate Commerce Act (24 Stat. 387; 49 U.S.C. Section 22).

Section 22 of the Interstate Commerce Act was recently amended by Public Law 85-246, 85th Congress, S. 939 (71 Stat. 564), approved August 31, 1957, by adding paragraph (2). As thus amended, Section 22 is set out on pages 10, 11 of Appendix B hereto.

There is nothing whatever in this section of the Interstate Commerce Act, nor in that Act as a whole, reflecting any policy of Congress to exempt the *intrastate* transportation of property of the United States from regulation by the states. Section 22 is a part of Chapter 1 of the Interstate Commerce Act and is subject to the provisions of Section 1 (2)(a) of that Act which, in pertinent part, states:

"(2) *Transportation Subject to Regulation.* The provisions of this Chapter . . . shall not apply—

(a) to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state . . . "

Whatever may have been the intention of Congress in 1887 in enacting the original Section 22 of the Interstate Commerce Act, the transportation of property of the United States free or at reduced rates was once required of land-grant railroads in order to compensate the Government for its grant of lands over which certain railroads were constructed. Later, the privilege of Section 22 was exercised by other railroads which had received no land grants but which desired to compete for Government business on even terms with the land-grant railroads. See *Southern Railway Co. v. U. S.* (1943), 322 U.S. 72; 88 L. ed. 1144. Subsequently, the privilege of Section 22 was extended to motor vehicle carriers subject to the jurisdiction of the Interstate Commerce Commission under the provisions of the Federal Motor Carrier Act (Part II of the Interstate Commerce Act; 49 Stat. 543; 49 U.S.C., Section 317(b)). The latter Act, however, contains this provision: "Nothing in this chapter shall be construed . . . to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." (49 Stat. 543; 49 U.S.C. 302(b)).

Moreover, the provisions of Section 22 impose no duty upon carriers, but are permissive only. *Nashville, Chattanooga & St. Louis Ry. v. State of Tennessee* (1923) 262 U.S. 318; 67 L. ed. 999.

In 1940, Congress, in repealing land-grant rates, i.e., those rates that the United States had enjoyed by virtue of the requirement imposed by prior law that land-grant railroads assess reduced rates for the transportation of persons and property for the United States, adopted the Act of September 18, 1940 (54 Stat. 954; 49 U.S.C. Section 65; Appendix B, p. 9), the material portions of which are as follows:

> "(a) Notwithstanding any other provision of law, but subject to the provisions of Sections 1(7) and 22 of this title, the full *applicable* commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to chapters 1, 8, 12, and 13 of this title of any persons or property for the United States, or on its behalf, . . .
>
> • • •
>
> "*Provided further,* That section 5 of Title 41, shall not after September 18, 1940, be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any *common carrier lawfully operating in the territory where such services are to be performed.*"

This statute imposes *upon the United States* an obligation to pay "the full applicable commercial rates" for transportation of its property, with the exceptions noted; and the proviso exempts procurement officers from the advertising requirement of 41 U.S.C. Sec. 5 (Appendix B, p. 11) with a clearly manifested recognition of local rate regulation as a substitute for competitive bidding.

The recent amendment to Section 22 was the culmination of wide spread dissatisfaction on the part of car-

riers and shippers with the reduced rates enjoyed by the Government. The 84th Congress had before it the so-called Hinshaw Bill (H.R. 525) which would have repealed outright the privilege of carriers to transport property of the United States free or at reduced rates. This bill was the subject of extensive hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives. (See report of hearings September 19, 20, 21, 22, 1955, of the First Session, and April 24, 25, 26, May 2, 3, 4, 8, 9, 10, 11, 22, 23, 24, 29, June 5, 6, 8, 12, 13, 14, 20, 1956, of the Second Session). Although this bill was approved by the House Committee on Interstate and Foreign Commerce, it was not enacted into law, and died with adjournment of the 84th Congress. The matter of reduced rates under Section 22 was brought up again, however, before the 85th Congress, and the amendment referred to was the result.

Although this amendment does not go so far as to repeal the right of carriers to transport property of the United States free or at reduced rates, it regulates and imposes conditions upon such right by requiring that reduced rate tenders or quotations be in writing and filed with the Interstate Commerce Commission. It clearly reflects a recognition by Congress of some of the evils that attended the unregulated and unqualified right formerly enjoyed, and represents at least a partial attempt to correct those evils, *to the extent that interstate commerce is involved.*

It is very important to realize that if the judgment below stands, California would be unable to take even this amount of corrective action in behalf of *intrastate*

commerce, *and there would result the anomaly that Congress had taken remedial action in the field of interstate commerce while California and other states were rendered powerless to correct the same kind of evils and abuses in intrastate commerce.*

It seems clear that there is nothing whatever in Section 22 of the Interstate Commerce Act, either before or after its recent amendment, disclosing any intention of Congress to interfere with state regulation of intrastate commerce. *Hughes Transp. v. United States* (1954) U.S. Ct. of Cl. 121 F. Sup. 212, 232.

Since *Penn Dairies* was decided, the law governing procurement of services and supplies by Governmental agencies has been amended by Congress, and it becomes necessary, therefore, to determine whether or not there is anything in the new law requiring a different result from that reached in *Penn Dairies*.

(2) The Armed Services Procurement Act of 1947 (62 Stat. 21).

This Act was formerly codified as Sections 151-161 of Title 41 of the U. S. Code. However, these sections were repealed by the Act of August 10, 1956 (Public Law 1028, of the 84th Congress, 2d Session, ch. 1041; 70A Stat. 641-677). The latter Act is entitled "An Act to Revise, Codify, and Enact into Law Title 10 of the United States Code, entitled 'Armed Forces', and Title 32 of the United States Code, entitled 'National Guard' ".

The legislative history of this Act is set out in U. S. Code Congressional and Administrative News, 84th Congress, 2d Session 1956, Volume 3, pages 4613-4651. This history makes it plain that Congress did not intend by

the Act of August 10, 1956, to effect any change in substantive law, but only to restate existing law (see pages 4620, 4621, 4631, 4635, 4640, 4641, 4651).

Procurement of property and services for the Armed Forces is now governed by Sections 2301-2314 of Title 10 of the U. S. Code, the pertinent provisions of which are set out in Appendix B hereto (pages 4-7). There is nothing whatever in said sections suggesting any policy of Congress inimical to state regulation of the rates of carriers for the transportation of property of the United States.

Since the Act of August 10, 1956 was not intended to change the substance of any law restated therein, it seems appropriate to examine the legislative history of the Armed Services Procurement Act of 1947 for any evidence of Congressional policy with respect to state rate regulation. This history, Senate Report No. 571, is set out in U. S. Code Congressional Service, 80th Congress, 2d Session 1948, Volume 2, pages 1048-1078. This report states (pages 1048-1049) that the "Purpose of the bill" is, in part, as follows:

> "This bill, as amended, provides for a return to normal purchasing procedures through the advertising-bid method on the part of the armed services, namely, the War Department, the Navy Department, and the United States Coast Guard. It capitalizes on the lessons learned during wartime purchasing and provides authority, in certain specific and limited categories, for the negotiation of contracts without advertising. It restates the rules governing advertising and making awards as well as fixing the types of contract that can be made. * * *

"This bill, as amended, makes uniform all the laws and rules covering purchase procedures for the armed services and repeals many obsolete and diverse laws. It contemplates that the regulations issued under this act by the respective departments shall be as uniform as practicable and that the procedures established thereby will expedite the development of cross procurement and combined purchasing.

"A quote from the House report presents their concept of the bill and applies equally to the bill as amended. The quotation is as follows:

"'* * * The bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments. It holds to the time-tested method of competitive bidding. At the same time, it pulls within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses, assures the Government of fair and reasonable prices for the supplies and services procured, and affords an equal opportunity to all suppliers to compete for and share in the Government's business. * * *'

"To this should be added that it places the Government's contracting officers in a position to secure better prices and products through broadened authority in certain specified instances. Both as it passed the House of Representatives and as reported to the Senate this bill has the approval of the General Accounting Office."

There is nothing in this language antagonistic to state rate regulation. On the contrary, there are indications elsewhere in the Senate Report that local regulation was

expressly contemplated. Thus, on page 1055, in analyzing a portion of the bill containing an exception to the requirement for advertising (now 10 U.S.C. Section 2304 (10)), where the contemplated procurement is "for property or services for which it is impracticable to obtain competition", reference is made to certain fields "*where prices are set by law or regulation.*" Again, on page 1062, in analyzing another section of the bill (now 10 U.S.C., Section 2304 (17)), dispensing with the requirements of advertising where "negotiation of the purchase or contract is otherwise authorized by law", reference is made to the Act of September 18, 1940 (54 Stat. 954; 49 U.S.C., Sec. 65; App. B, pp. 9, 10), referred to above, which authorizes the procurement of transportation services without advertising when the services required can be procured from any "common carrier lawfully operating in the territory where such services are to be performed."

(3) Regulations promulgated by Department of Defense.

The regulations promulgated by the direction of the Secretary of Defense under the authority of the Armed Services Procurement Act of 1947 and subsequent statutory authority, establishing for the Department of Defense uniform policies and procedures for the procurement of supplies and services, are contained in 32 CFR, 1956 Supp., Subchapter A, Section 1.100 through Section 30.4, the material parts of which are set out in Appendix B hereto (pp. 18-25).

In these regulations there is clearly discernible a policy of *recognition and acceptance* of local regulation of rates

for transportation services. Thus, in implementing Section 2(c)(10) of the Armed Services Procurement Act of 1947 (now 10 U.S.C. Sec. 2304 (a)(10) exempting procurement officers from the requirement of competitive bidding in procuring "supplies or services for which it is impracticable to secure competition", Section 3.210-2(j) gives, as illustrative of circumstances justifying this exemption, procurement for certain transportation services "when ... the rates are established *by law or regulation*." *Penn Dairies v. Milk Control Commission* (1943), 318 U.S. 261, 277; 87 L. ed. 748, 757, 758.

Again, Section 3.210-2(k) states that negotiation for commercial transportation by common carriers is authorized by Sections 3.217 to 3.217-2 and by 49 U.S.C. Section 65. Said Sections 3.217 and 3.217-2 implement 10 U.S.C. Section 2304(a)(17) authorizing negotiation when it is "otherwise authorized by law." 49 U.S.C. Section 65 (Appendix B, pp. 9, 10) is such a law. It has already been referred to above in connection with the discussion of Section 22 of the Interstate Commerce Act and of the legislative history of the Armed Services Procurement Act of 1947. It authorizes procurement of transportation services without advertising when they can be procured from any "common carrier lawfully operating in the territory where said services are to be performed."

Again, Section 1.306-9 (promulgated, it is interesting to note, on September 6, 1956, three months after the date of the judgment of the District Court) recites that "Generally, carriers are *required* by both Federal *and State laws* to charge all shippers equally for like services rendered. However, *when* government traffic possesses more

favorable transportation characteristics . . . than commercial traffic between the same origins and destinations, freight rates are often lower for the government traffic."

In order to control the negotiated procurement of public utility services other than transportation, the Department of Defense has prescribed the use of certain forms referred to in 32 CFR, 1956 Supp., 16.501 through 16.501-2 (Appendix B, pages 23-25). Section 16.501-1 provides that such utility services shall be procured without a written contract "*when the supplier's rates are regulated by a Federal, State, or other public regulatory body* and when the annual cost of the services to be procured is estimated . . . to be $2400 or less. * * * Deviations from the provisions of the form are authorized when necessary in order to *comply with State or local laws and regulations.*"

These regulations of the Department of Defense reflect a much greater tolerance of state regulation of rates and prices than did the regulations of the War Department that were in effect at the time of the sale of milk that gave rise to the *Penn Dairies* case, and that were referred to by Mr. Justice Douglas in his dissenting opinion in that case at 318 U.S. 261, 283, 284; 87 L. ed. 748, 760, 761.

In view of these plain indications of a policy of recognition and acceptance, by Congress and by the civilian head of the Department of Defense, of state regulation of transportation rates, as well as rates for other kinds of public utility services, it is very difficult to understand how the District Court reached the conclusion that Congress has expressed by the Armed Services Procurement Act "a general policy that the procurement of transportation serv-

ices for the shipment of government property be by contract and special arrangements and not subject to regulation by commissions and other bodies vested with the power of regulating the rates for the transportation of property generally." (R. 254) Nor does the opinion of the District Court throw much light upon how it reached this conclusion. It contains not a single word about the Armed Services Procurement Act of 1947 nor about Department of Defense regulations promulgated thereunder.

It would seem that the District Court made no attempt to analyze the statute or the regulations reflecting the policy of the *civilian* authorities of the Federal Government, but heeded only the highly charged emotional appeal of certain military officers who frightened the District Court into believing that local civilian regulation of transportation rates would jeopardize the Nation's safety. The sharp contrast between the views of the civilian and military authorities, which was exemplified by General Lasher in his openly expressed disagreement with the views of his civilian superior, Secretary of Defense Charles E. Wilson (R. 426), reveals the deep-seated disagreement that appears to exist between the civilian and military authorities of the Federal Government, a disagreement that was referred to by counsel for the Government at the trial as a "dynamic struggle" (R. 424, 894).

In a democracy, however, military officers are soldiers, not statesmen; their duty is not to dispute but to accept and to carry out the policies formulated by their civilian superiors. It could hardly be presumed that men trained in the military arts would qualify as authorities on the vital constitutional issue here presented.

(4) The Federal Property and Administrative Services Act of 1949 (63 Stat. 378, et seq.).

The Federal Property and Administrative Services Act of 1949 (63 Stat. 378, et seq.) has been codified in 5 U.S.C. Sec. 630; 40 U.S.C. Secs. 471, 472, 474, 481, 486; 41 U.S.C. Sec. 5, 251-260; and 44 U.S.C. Sec. 391. Material portions of this statute are set out on pages 12-18 of Appendix B hereto.

The history of this statute is set out in U.S. Code Congressional Service, 81st Congress, 1st Session, 1949, Volume 2, pages 1475-1511. On pages 1479-1480 it is stated: "... the bill provides a central system relating to traffic management, transportation, and other public utility services for the use of executive agencies * * * Title III [procurement procedure] extends to the General Services Agency the principles of the Armed Services Procurement Act of 1947, with appropriate modifications principally designed to eliminate provisions applicable primarily to the military. * * * This title provides for the modernization of procurement methods and procedures. It clarifies and preserves the formal advertising method of procurement, but at the same time, under proper control, authorizes negotiation in certain classes of cases * * * The Committee believes that Title III is substantially in accord with the recommendation made by the Commission on Organization of the Executive Branch of the Government in its Report on the Organization and Management of Federal Supply Activities, that legislation be enacted to apply the principles of the Armed Services Procuremept Act of 1947 to buying by all agencies, * * *"

On page 1485 it is stated: "The Administrator . . . may for the use of executive agencies represent such agencies

in negotiations with carriers and other public utilities, and in *proceedings before regulatory bodies involving carriers and other public utilities.*"

On page 1495, referring again to Title III, Procurement Procedure, it is stated: "This title follows in structure, and is identical in language with, the Armed Services Procurement Act, with a few appropriate changes and omissions."

On page 1496 in referring to Section 302(c) (41 U.S.C. 252(c)), it is stated: "Initially, this subsection reaffirms the basic principles that purchases and contracts shall be made by advertising. Negotiation is made permissible in certain excepted cases, however, to provide flexibility in Government procurement." In referring to Section 302(c)(1) (41 U.S.C. 252(c)(1)), it is said: "This paragraph would permit automatic and immediate transition from more rigid peacetime advertising procedures to a completely flexible system if the President or the Congress declares the existence of a national emergency." In referring to Section 302(c)(9) (41 U.S.C. 252(c)(9)), it is said: "This paragraph provides for negotiation where it is impracticable to secure competition and places upon the agency concerned the maximum responsibility for decisions as to when it is impracticable. It is intended that this paragraph should be construed liberally."

In that section of the Act where Congress declares its policy, viz., 40 U.S.C. Section 471, it is stated that "It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related func-

tions such as . . . transportation and traffic management, . . . management of public utility services . . . and *representation before Federal and State regulatory bodies . . .*"

Nothing could be plainer in showing Congress's recognition and acceptance of state regulatory authority over various kinds of transactions in which Government procurement officers may be interested.

This policy is also reflected in 40 U.S.C. Section 481 wherein the General Services Administrator "to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service . . .", is empowered to prescribe policies and methods of procurement of property and services, including transportation and traffic management, and management of public utility services, and, "with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities *before Federal and State regulatory bodies . . .*" A proviso, however, permits the Secretary of Defense to exempt, unless the President shall otherwise direct, the Department of Defense from action by the General Services Administrator "whenever he determines such exemption to be in the best interests of national security."

In referring to this proviso, the legislative history above referred to states (p. 1486):

> "Combat equipment and other items of peculiar importance to the armed forces could thus readily be excluded by the Secretary of Defense. At the same time, the Administrator would be in a better position

to serve the armed forces more fully in meeting their other supply requirements, and he can appeal to the President if he thinks the Secretary of Defense has wrongly excluded him from any field."

On October 2, 1954, the Secretary of Defense gave notice that he had elected to exercise this right. This notice was published in 19 Federal Register, p. 6611, and is set out on pages 28, 29 of Appendix B hereto. In this notice the Secretary of Defense announces his decision to exempt the Department of Defense from action taken by the Administrator of General Services in "(a) the prescription of policies and methods of procurement and supply of transportation and traffic management, (b) the performance of functions related to procurement and supply of transportation and traffic management, and (c) *the representation* in negotiations with carriers and *in proceedings involving carriers before Federal and State regulatory bodies* in transportation and traffic management."

This decision means that the Secretary of Defense has decided to retain independence of action in the matters referred to, on behalf of the Armed Forces. It has already been shown above, however, that the Secretary of Defense has taken no action inimical to state regulation of rates for the transportation of property for agencies within the Department of Defense, but, on the contrary, has promulgated regulations that recognize and accept such regulation.

In the provisions pertaining to procurement, the Federal Property and Administrative Services Act of 1949 reflects the intention of its framers to model it upon the Armed Services Procurement Act of 1947. Thus, 41 U.S.C. Section

252(c), permitting the General Services Administration to negotiate for property and services without advertising in certain cases, specifies many of the same grounds for such exemption as those contained in 10 U.S.C. 2304 (Appendix B, p. 5), and, like the latter Act, is wholly consistent with State regulation of rates for the transportation of property of the General Services Administration.

(5) Regulations promulgated by the General Services Administration.

The regulations of the General Services Administration governing procurement of transportation and public utility services are set out in 44 CFR, 1956 Supp., Sections 53.6(a)-(d), 53.21, and 54.25, appearing on pages 26-28 of Appendix B hereto.

Nothing has been found in any of these regulations disclosing any policy of the General Services Administration that procurement of transportation or other public utility services by it is to be free of regulation by the States. It appears on the contrary that such regulation, at least of public utility telephone service, is expressly contemplated in Section 54.25 prescribing a form of contract for telephone service which states that "This contract is subject to all rates, charges, rules, practices . . . or requirements which may be *lawfully established*"; and under "Instructions", this form provides that "if charges are approved or ordered by *any legally constituted authority having jurisdiction*, or otherwise *lawfully established* by the contractor, which affect the charges for exchange service, or any of the terms of an existing contract or of these instructions, subscriber [i.e., General Services Administration] shall be notified thereof. . . ."

In practice, the Administrator of General Services and the Secretary of Defense have given further tangible evidence that they consider procurement for the United States as subject to State regulation by frequently appearing before State regulatory bodies in rate making proceedings. As noted earlier in this brief (supra, p. 16), the appearance of "Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the United States Government" was entered in the proceeding before the Commission that gave rise to the complaint in the present case.

Notices of such appearances of various Federal Agencies before other regulatory bodies are frequently published in the Federal Register. For example, on May 12, 1955 (20 Federal Register page 3240) notices of such appearances before the Arkansas Public Service Commission and the Georgia Public Service Commission were published. Another such notice was published on August 29, 1956 (21 Federal Register 6730) containing a delegation of authority by the General Services Administrator to the Secretary of Defense to appear before the California Commission in a proceeding involving an application by the California Electric Power Company for authority to increase its electric rates.

These appearances make it clear that the Department of Defense and the General Services Administration long ago established the necessary organization, personnel, and procedures to protect the interests of the United States before State rate-making bodies. Section 530 of the Public

Utilities Code, therefore, does not impose any burden upon the United States that had not already been assumed.

One of the very significant things to be observed in the statutes enacted by Congress is the ample provision it has made for national emergencies. In the Armed Services Procurement Act (10 U.S.C. Sec. 2304(a)(1); Appendix B, p. 5) authority is granted to procurement officers to negotiate for property or services if "it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President." A similar provision appears in the Federal Property and Administrative Services Act (41 U.S.C. Sec. 252(c)(1); Appendix B, pp. 15-16). Moreover, in the Armed Services Procurement Act (10 U.S.C. Sec. 9742; Appendix B, p. 7), Congress has provided that "In time of war, the President, through the Secretary of the Air Force, may take possession and assume control of all or part of any system of transportation to transport troops, war material, and equipment, or for other purposes related to the emergency. So far as necessary, he may use the system to the exclusion of other traffic."[20] With these precautions having been taken by Congress in clear anticipation of real national emergencies, there is no reason for the District Court to have decided the present case under the illusion of a continuing emergency conjured up by the military authorities in order to paralyze the exercise by the States of their rights under the Tenth Amendment.

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[20]10 U.S.C. Sec. 4742 is identical with the quoted Section 9742 except that the Secretary of the Army appears in the former in place of the Secretary of the Air Force.

The Commission finds it incomprehensible that the District Court ruled that in the Federal Property and Administrative Services Act of 1949 "Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be by contract and special arrangements and not subject to regulation by commissions and other bodies vested with the power of regulating the rates for the transportation of property generally." (R. 254) In the District Court's opinion, there is only a single casual reference to this Act (R. 203) and none whatever to the regulations promulgated by the General Services Administration under it.

The conclusion is inescapable that the District Court made no attempt to analyze any of the statutes or administrative regulations pertaining to the procurement of transportation and other public utility services for any of the agencies of the Federal Government.

In the light of the foregoing examination of the statutes and regulations, the District Court was clearly wrong in its ruling with respect to the policy of Congress.

This concludes the Commission's analysis of those matters which the *Penn Dairies* case defined as the proper subjects of inquiry in cases like the present. In the light of that analysis, the Commission respectfully submits that nothing has been done, with respect to procurement, either by Congress or by any administrative agency, since *Penn Dairies* was decided, showing any intention to abrogate the police power of the States for the sake of relieving the Armed Forces or any other agency of the Federal

Government from the effects of State regulation of the rates of carriers or other suppliers of public utility services.

On the contrary, the statutes enacted by Congress and the administrative regulations promulgated thereunder since *Penn Dairies* indicate that they were adopted in plain recognition of the principles of that case and of the result reached therein.

Nor have any other events occurred that make it necessary or desirable to depart from *Penn Dairies*. Subsequent history rather has proven the fundamental validity of that decision. It is now generally recognized that the United States must continue to maintain, for an indefinite period of time, a large military establishment in order to preserve the nation's security. But it does not follow that we must prejudice or compromise our fundamental political rights, nor is it necessary that the civilian officials of our Government abdicate their authority in deference to the military.

Congress may still be entrusted to take whatever further measures may be necessary to suspend those rights when the time comes, if it should ever come.

In the meantime, this immense military establishment, having become a user of transportation and other public utility services on a vast scale, should not be subsidized by other users of such services. These other users include all segments of society, large and small, individual and corporate, commercial and philanthropic.

In *Penn Dairies* and also in *Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 88 L. ed. 635, this Court

demonstrated, even during the extreme emergency of World War II, that it could not be stampeded into an abrogation of the rights of the States for the sake of military expediency. There is far less urgency now with conditions of peace prevailing.

The District Court's distinguishing of *Penn Dairies* from the present case on the ground that "There is a constitutional difference between a can of milk and a hydrogen bomb!" was superficial to say the least, and loses all meaning when it is remembered that the District Court's sweeping injunction *prohibits the Commission from regulating rates for the transportation of milk or any other commodity for the Government, as well as bombs.*

The other ground of distinction advanced by the District Court was that the Pennsylvania regulation imposed "no prohibition on the National Government or its officers", and that such officers might "purchase milk from whom and at what price they wished, without incurring any penalty." (R. 235), whereas Section 2112 of the Public Utilities Code provides "penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act." (R. 235).

This ground, however, loses its weight in the light of the fact that the complaint makes no reference whatever to this section of the Public Utilities Code, nor to any act or threatened act under it, nor did it name as defendant any law enforcement officer charged under California law with the duty of enforcing Section 2112. The only reference in the complaint to penalties is a general one, without reference to any specific section of the Public Utilities Code, to "penalties *upon common carriers.*" (R. 7)

If there is any genuine anxiety that Section 2112 of the Public Utilities Code might subject officers of the Federal Government to penalties for aiding and abetting carriers in violating Section 530 of the Public Utilities Code or Commission regulations thereunder, an anxiety apparently not felt by the Government when it filed its complaint, then the applicability and effect of Section 2112 should be decided either in a proceeding in which it has been invoked, or at least as a question presenting different considerations from the question of the applicability of penalties to carriers. There is no reason for nullifying, in this proceeding, the applicability of Section 530 *to carriers* simply because another California law might be construed to impose penalties upon officers of the United States. The two questions are clearly severable.

Section 21 of the Public Utilities Code states: "If any provision of this code, or the application thereof to any person or circumstance, is held invalid, the remainder of the code, or the application of such provision to other persons or circumstances, shall not be affected thereby." *Watson v. Buck* (1941) 313 U.S. 387, 397; 85 L. ed. 1416, 1421, 1422.

There is nothing in *Leslie Miller, Inc. v. Arkansas* (1956) 352 U.S. .....; 1 L. ed. 231, that is at variance with *Penn Dairies*. In the *Miller* case, there was a patent conflict between the regulations of the Federal Government, as contained in the Armed Services Procurement Act, laying down certain qualifications for contractors performing construction work for the Federal Government, and different qualifications contained in an Arkansas law governing the licensing of such contractors. In effect,

Federal law said to Miller, "You may perform construction work for the Federal Government"; while Arkansas said in effect "You may not." Of course, the State law must yield in such a set of circumstances.

A case presenting a similar question, and one decided the same way, is *Hill v. Florida* (1945) 325 U.S. 538; 89 L. ed. 1782. This decision nullified a Florida law imposing qualifications and requiring licenses for labor union organizers, and imposing upon unions certain requirements compliance with which was a condition precedent to their right to function. The reason for the decision was that such law conflicted with the policy of the National Labor Relations Act granting to labor the right to freely choose its own representatives.

In both these cases the State law conflicted with a clearly expressed policy of Congress.

Another kind of State law was nullified in *Johnson v. Maryland* (1920) 254 U.S. 251; 65 L. ed. 126, [relied upon by the Government here], where a postal employee was arrested and convicted in Maryland for driving without a license from the State. In that case, the Court, through the late Mr. Justice Holmes, said (pp. 55-57, L. ed. 128, 129): "Here the question is whether the state can *interrupt the acts of the general government itself* • • • [the State's] requirement does not merely touch the government servants remotely by a general rule of conduct; it *lays hold of them* in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient."

In the present case, the amendment to Section 530 of the Public Utilities Code does not prohibit carriers from per-

forming services the Government wants performed. It says "The Commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable * * * ." This statute does not empower the Commission to withdraw or interfere with the right, nay the *duty,* of *common* carriers, to transport, that is, to perform a service the United States wants performed, but says, in effect, when considered with Section 494 (Appendix B, p. 31), that carriers, after performing such service, shall charge the same rate as that charged to other shippers, unless the Commission authorizes a lesser charge.[21] Thus it is seen that the California statute in question does not "interrupt the acts of the general government itself", nor does it "lay hold of" Government servants attempting to obey orders. Nor has the Government argued that it does. Rather it professes to be aggrieved by the incidental effect upon it that would result from a law that impinges directly upon carriers with whom it has contracted for the transportation of its property.

This Court has decided, however, in a number of cases, in addition to *Penn Dairies,* that State laws that impinge directly upon persons contracting with the Government are not to be nullified merely because they incidentally affect the Government. Thus, the State law was sustained in *Alward v. Johnson* (1931) 282 U.S. 509; 75 L. ed. 496,

[21] If there is any doubt that this is the proper interpretation of the statute then, as suggested in an earlier part of this brief (supra, pp. 57, 58), the Supreme Court of California should be given an opportunity to interpret it authoritatively.

involving a gross receipts tax upon an independent contractor carrying the mails; in *James v. Dravo Contracting Co.* (1937) 302 U.S. 134, 149-161; 82 L. ed. 155, 166-173, involving a gross receipts tax upon one who had contracted to build a dam for the Government, and in which the earlier authorities were comprehensively reviewed; in *Baltimore & A.R. Co. v. Lichtenberg* (1939) 176 Md. 383, 4 Atl. 2d 734; appeal dismissed, 308 U.S. 525, 526; 84 L. ed. 444, involving safety regulations affecting the operations of a trucking company in performing its contract with the Government to transport workers employed on a Public Works Administration project; in *James Stewart & Co. v. Sadrakula* (1940) 309 U.S. 94, 84 L. ed. 596, involving the applicability of a State statute requiring building contractors to board over all open steel tiers for the protection of employees, to one who had contracted to build a post office for the Government on land ceded to it; and in *State of Alabama v. King & Boozer* (1941) 314 U.S. 1; 86 L. ed. 3, in which the question was whether a sales tax chargeable to the seller but to be collected from the buyer could be assessed against a lumber dealer from whom a building contractor had ordered lumber for use in building an army camp he had agreed to construct for the United States under a contract construed to impose upon him the obligation to pay the purchase price of necessary materials.

The last cited case was distinguished in *Kern-Limerick, Inc. v. Scurlock* (1954) 347 U.S. 110; 98 L. ed. 546, in which an Arkansas gross receipts tax was held inapplicable to a sale of tractors purchased by persons who had contracted with the Navy, under the Armed Services

Procurement Act, for the construction of an ammunition dump under terms authorizing the purchase by the contractors of equipment to be used in the construction, and providing that with regard to such transactions the United States should be the purchaser.

In this case the majority of the Court expressly rested its decision upon the ground that ". . . it is clear that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction * * * We find that the purchaser under this contract was the United States. Thus, King & Boozer is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States." (347 U.S. 121, 122; 98 L. ed. 556) The tax was held to be prohibited as one "levied on the property or purchases of the Government itself." (p. 123, L. ed. 557)

It has already been shown that Section 530 of the Public Utilities Code, coupled with Section 494, impinges directly upon carriers by requiring them to charge their tariff rates for the transportation of Government property, unless otherwise authorized by the Commission, and only indirectly affects the United States. The effect of the statute upon the United States has been discussed in a preceding part of this brief (supra, pp. 119-123) where the evidence adduced at the trial was analyzed. That analysis showed that the only possibly injurious incidental effect of Section 530, as amended, upon the United States was that of increased cost for transportation services furnished by commercial carriers.

Even assuming that such costs would be substantially increased by State regulation, that is not sufficient ground for nullifying such regulation, as stated in *Penn Dairies, Inc. v. Milk Control Commission* (1943) 318 U.S. 261, 269; 87 L. ed. 748, 753. But there is good reason to believe, as the analysis of the testimony of the Commission's witnesses shows (supra, pp. 93, 95, 96), that there would be no sharp increase in such costs, and that even the incidental effect upon the United States of State rate regulation of carriers would be negligible.

(6) Federal enclaves.

In its argument to the District Court upon the Commission's motion to dismiss, the Government cited certain cases that decided that commerce between a territory and a State and between the District of Columbia and a State is interstate commerce (R. 177). It then cited the case of *Pacific Coast Dairy, Inc. v. Department of Agriculture* (1942) 19 Cal. 2d 818; 123 Pacific 2d 442, 447 (reversed on other grounds, in 318 U.S. 285; 87 L. ed. 761) for the proposition that commerce between states and such military installations as Moffett Field, which is under the exclusive jurisdiction of the United States, is interstate commerce (R. 178). It then argued that "a number of the installations in the State of California, particularly the older ones, are situated on land which has been ceded to the United States and are held under its exclusive jurisdiction", and conjectured that shipments "might" move from one such installation to another (R. 179). The conclusion was that "the carriers and the contracting officers would have no firm basis on which to carry out their ne-

gotiations and arrangements without constant advice from lawyers in an esoteric field of the law. The confusion and uncertainty would be great indeed." (R. 179)

At the trial the Government offered in evidence a number of documents purporting to show the acquisition by the Federal Government of exclusive jurisdiction over a number of (but far from all) military installations in California (R. 778-860).

The problem and the confusion arising out of the status of such installations and shipments between them was again adverted to by the Government at the conclusion of the trial as an argument for nullifying State rate regulation (R. 713).

There are many things wrong with this argument. In the first place, there is no evidence in this record of any shipment between one installation under the exclusive jurisdiction of the United States and another such installation. Such shipments are purely conjectural. It follows, of course, that there is no evidence as to what percentage of the total Government intrastate traffic in California is between such installations. As already suggested in an earlier part of the brief (supra, p. 52) if a decision exempting Government shipments from State rate regulation is to be predicated upon the fact that such shipments move from one Federal enclave to another, such a decision should be made only in a proceeding involving a shipment or shipments that have actually so moved.

The case of *Pacific Coast Dairy, Inc. v. Department of Agriculture* (1943) 318 U.S. 285; 87 L. ed. 761, referred to above, does not help the Government here, for

the reason that all of the elements of the transaction that was the object of California's asserted power in that case, namely, an actual sale and delivery of milk at a price less than that fixed by California as minimum, took place upon ground that was under the exclusive jurisdiction of the United States, and the effect of the case is limited to a nullification of a specific exercise of State power over a specific transaction. In the present case, however, the object of California's asserted power is a continuing series of transactions involving the transportation of various kinds of property of the United States between various pairs of termini, many of which have not been proved to be under the exclusive jurisdiction of the United States, *and a very large part of these transactions takes place over the public highways of the State of California, outside Federal jurisdiction.*

Thirdly, the position of the Government with respect to Federal enclaves requires that it differ sharply from the conclusion reached in *Hughes Transportation, Inc. v. United States* (1954) 121 Fed. Supp. 212, in which the United States Court of Claims, in a comprehensive and scholarly opinion, decided that the transportation of ammunition by a commercial carrier for the United States Government between two Federal enclaves in the State of Kentucky, but with the intervening transportation taking place over the public highways of Kentucky, was not interstate commerce, and was subject to rate regulation by Kentucky.

Finally, it seems to the Commission that the alleged confusion arising from the premises described and relied upon by the Government as a reason for exempting

transportation between Federal enclaves in the same State from State rate regulation, argues in favor of the conclusion reached in the *Hughes* case, namely, that such transportation, when it involves an intermediate movement over a State highway, is not in interstate commerce.

CONCLUSION.

All the cases cited by the Commission in support of its position upon the ultimate question in this appeal involve a vindication of the rights of the States under the Tenth Amendment of the Constitution of the United States. In the present case it is the police power of the States under the Tenth Amendment that is at stake, and the exercise of that power in a very important area of the States' economies is involved. If the judgment below stands, grave doubt will be thrown upon the right of California (and other States to follow) in regulating intrastate transportation rates, to obtain information pertaining to carriers' revenues from transportation for the largest shipper in the State, or information pertaining to expenses incurred in rendering service to that shipper. The injunction is in very sweeping terms and prohibits the Commission "from taking *any* action or issuing *any* orders which would *interfere* with the United States and the various carriers in the State of California from [sic] entering into special arrangements with respect to rates for the transportation of property of the United States." (R. 257).

It is doubtful, therefore, if the Commission, in the shadow of this injunction, could ever determine the extent

to which other shippers were paying for transportation performed for the United States.

It has already been stated in a preceding part of this brief (supra, pp. 68, 69) that if the Court should hold that the States have no right to regulate rates for the intrastate transportation of property of the United States, it would be difficult to sustain the right of the States to regulate the rates of public utilities furnishing other kinds of services to the United States, with the result that civilian users of such services might have to bear a substantial but unknown part of the cost of rendering public utility services to the United States. The States have the right under the Tenth Amendment and a duty to protect their citizens against this kind of injustice.

California has not sought to discriminate against the United States, nor to hinder it in the performance of its sovereign responsibilities in maintaining the military establishment. California does not seek to preclude the United States from obtaining necessary transportation services, nor require it to pay more than others for such services. It seeks only to insure that the United States pay its fair share of the costs of transportation in California and to remove the unjust discrimination from which commercial shippers have been suffering.

". . . the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237. ". . . we should be slow to strike down legislation which the state concededly had power to enact because of

its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies, Inc., v. Milk Control Commission* (1942) 318 U. S. 261 275; 87 L. ed. 748, 756.

The Commission again respectfully urges the Court to remand this case to the District Court with instructions to dismiss the complaint for the reason that the District Court should not have entertained it. If, however, the Court has considered and wishes to decide the ultimate question in this proceeding, the Commission respectfully submits that the judgment of the District Court should be reversed, and that judgment should be entered for the defendant.

Dated, San Francisco, California,
October 15, 1957.

Respectfully submitted,

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(Appendices A, B and C Follow.)